

GOVERNMENT

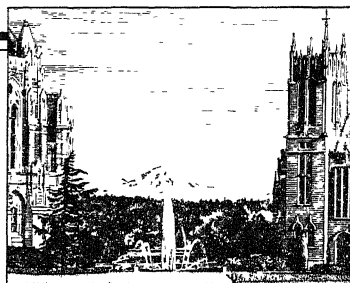
REGULATION

OF

INDUSTRIAL

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GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS

THE PRENTICE-HALL INDUSTRIAL RELATIONS
AND PERSONNEL SERIES

DALE YODER, Editor

Government Regulation of Industrial Relations

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To
E. S. T.

PREFACE

EVER since the rights of employees to organize and to have representatives of their own choosing were given governmental protection by the Wagner Act, the great industrial-relations challenge has been the effectuation of collective bargaining as a constructive social institution. Governmental encouragement of collective bargaining was looked upon, during the struggle to overcome the consequences of the 1929 depression, as necessary to assure that the determination of employment conditions would be retained in private hands. The task of actually fashioning collective bargaining, however, devolved primarily upon unions and management.

Employees were to be assisted in their efforts to create an organized strength so they would be better able than in times past to take care of their own interests, particularly in dealings with employers. Unions and management would then be free to work out their own problems in their own way and by their own devices. Industrial self-government was the ideal that was sought. In arguments over whether or not too much organizational assistance was provided to the employees, there has been a disposition to lose sight of these fundamental objectives.

Significant progress has been made since 1935, nevertheless, in the development of collective bargaining as a mechanism of industrial self-government. In many plants and industries, unions and management met the challenge with distinction. They were able to work out mutually satisfactory relationships without recourse to work stoppages and with a proper regard for consumer necessities. Had the

times been less critical, the progress might well have been looked upon as at least highly encouraging and perhaps as convincing proof that the collective-bargaining ideal would gradually be achieved throughout industry.

Adoption of collective bargaining as the cornerstone of our industrial relations was unfortunately followed within a few years by World War II and then by its aftermath called Reconversion. Government regulation of industrial relations was extended into the area that had been assigned to joint dealings between unions and management. Under conditions of a war emergency and in the interest of minimizing the chances of production stoppages, collective bargaining was suspended before it had got fairly under way. "Take the issue to the War Labor Board" became the phrase of the day, rather than "Resolve it around the bargaining table."

Then came the reconversion period with its unprecedented economic problems. A strong inflationary movement set off a race between wages and prices. The inadequacies of collective bargaining in dealing with these formidable postwar problems were evidenced by an unparalleled rash of strikes. Production was high but was nevertheless restricted by numerous stoppages. A widespread public demand arose for a try at government-managed collective bargaining. That demand was met by passage of the Taft-Hartley Act.

In the short space of twelve years, from passage of the Wagner Act in 1935 to enactment of the Taft-Hartley Act in 1947, government control over industrial relations was extended from a relatively limited regulation of the organizational preliminaries of collective bargaining to a supervision of the scope of and the procedural and substantive issues of the collective-bargaining process itself. The idea of industrial self-government was partially eclipsed. Confidence in the ability of unions and management peacefully and soundly to compose differences between themselves by

their own devices dwindled materially. Nor is there any notable evidence of any reversal of these trends. On the contrary, many persons look upon the Taft-Hartley Act as no more than "a good beginning" toward the introduction of a really complete program of government-regulated industrial relations. Management's stake in this situation is every bit as great as that of organized labor. Only, this stark fact is temporarily obscured by the course that the current "swing of the pendulum" has taken.

The idea of industrial self-government which is implicit in the concept of collective bargaining should be neither casually nor inadvertently dismissed. There are compelling reasons, moreover, why this idea should be soberly reappraised in days when the United States has dedicated itself anew to the strengthening of our kind of democracy in the face of a strong worldwide trend toward the amassing of power in central governments.

It is timely, indeed, to take inventory of the shortcomings and inadequacies of collective-bargaining practices with a view toward charting a way to better industrial self-government. There is a no less urgent need to evaluate the strong trend in our own country toward government regulation of industrial relations in order to discern whether that is either inevitable or socially desirable. The principal purpose of this book is to take such an inventory and to make such an evaluation.

Preparation of the book was made possible by a grant from the Rockefeller Foundation provided through the Industrial Research Department of the Wharton School of the University of Pennsylvania.

The ideas and points of view set forth in this book have been talked over with many colleagues and they have also been "tried out" in speeches and in discussions with numerous groups of industrial-relations people. The many comments received were of invaluable assistance, although, of

course, the final expression is my sole responsibility. This responsibility was lightened immeasurably by the capable manner in which Nancy Bressler and Janet Hall typed the manuscript through many revisions. To them I express my thanks.

George W. Taylor

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GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS

Chapter I

COLLECTIVE BARGAINING VS. GOVERNMENT REGULATION

ONE conclusion invariably emerges whenever and wherever "the labor problem" is subjected to impartial analysis. It is: collective bargaining must be preserved and strengthened as the bulwark of industrial relations in a democracy. This is just another way of saying that organized labor and management should settle their own differences by understanding, compromise, and agreement and without government interference.¹ A rare unanimity of opinion exists about the soundness of collective bargaining as the most appropriate means for establishing the conditions of employment.

Despite widespread agreement about the basic principle, progress toward satisfactory industrial relations through collective bargaining has been difficult and sometimes seemingly impossible. Seldom is there a full comprehension, by the parties or by the public, of the fact that collective bargaining doesn't produce results automatically. Success depends first of all upon a state of mind that leads to restraint in the use of power and then sparks a purposeful direction of the mechanics of joint dealing toward agreement-making. Reconciliation of conflicting demands through understanding, persuasion, and by compromise is the essence of collective bargaining. Labor, management, and government

¹ The challenging aspects of collective bargaining can best be understood by contrasting it with the alternative ways of fixing the terms of employment. They include the unilateral determination by employers or unions and the imposition of terms by the government.

policies all have to be geared to that objective if collective bargaining is to produce the results expected of it. In the absence of any commonly accepted philosophy about collective bargaining, either labor or management often looks upon economic power as a means for imposing its will upon the other. The party that gets pushed in the corner then looks about for assistance and invariably turns to the government for help.

Government intervention in industrial relations has been urgently and successfully sought at various times by representatives of labor, of management, and of the public as well. Deep-seated dissatisfactions about the possibilities or results of free collective bargaining have impelled first one and then the other of these parties to seek their objectives by legislation or government directive. A strictly "hands off" policy for the government has not been possible, because someone is always looking to the government for assistance. Consequently, government intervention in industrial relations has been steadily on the increase.

A great question of our times about industrial relations concerns the degree of direction and control that can be undertaken by the government without a fatal effect upon collective bargaining. What issues should be determined by the government and which should remain as strictly private matters? The most crucial determination in the formulation of a national labor policy is made when this question is answered.

Wide latitude of decision and an extensive right to use economic power as the ultimate determinant of unresolved issues must remain with unions and with management if the essentials of collective bargaining are to be preserved. Each substantial narrowing of latitude and every restriction upon the right to strike weakens the structure of collective bargaining. There is an urgent need for sober evaluation of the extent to which decision-making has already been transferred from the negotiating table to the halls of Congress.

On three occasions in recent years, the government has formulated comprehensive policies to insure that labor and management conduct their affairs in the public interest. In each case, the government extensively intervened in industrial relations. The vehicles for the intervention were the National Labor Relations Act of 1935, the emergency programs of World War II, and the Labor-Management Relations Act of 1947. These programs constitute the principal endeavors to reconcile widespread demands for government direction of industrial relations with the necessities of collective bargaining.

In this book, the three programs are contrasted and evaluated. Each is grounded upon its own distinctive concept of government's proper role in industrial relations. Each concept carries widely different modifications of free collective bargaining. These contrasting concepts have to be understood and evaluated if future decisions are to be intelligently made. No one can afford to assume that the great question of industrial relations was settled "once and for all" with the passage of the Taft-Hartley Act in 1947.² Whether there is to be more government or less government in industrial relations is certain to be a vital issue for many years to come. A sound judgment about our future course can scarcely be made in the absence of an understanding of the three ventures already undertaken.

The National Labor Relations Act of 1935

The National Labor Relations Act³ was built upon two main premises: (1) the government should assist employees to organize unions as a means of assuring them an "equality of bargaining power"; and (2) except for conciliation activi-

² The official title of the legislation is "Labor Management Relations Act, 1947." Sponsored by Congressman Fred Hartley and by Senator Robert A. Taft, it is commonly referred to as the Taft-Hartley Act.

³ The legislation is popularly called the Wagner Act. Both titles are used interchangeably in industrial-relations terminology and both are used in this book.

ties, no further industrial-relations responsibility or function should be assumed by the government. At the same time, collective bargaining was to be encouraged. A narrow program of government intervention limited mainly to the preliminaries of collective bargaining was thus devised. Under this policy, fixing the actual terms of employment remained essentially a private matter.

The Wagner Act was a kind of enabling legislation. Congress reasoned that collective bargaining was a good thing for the country. Its practice could never become widespread, however, unless organizational efforts of employees were protected against employer counter-measures. There couldn't be any collective bargaining unless unions were formed. Employers were subjected to numerous legal restraints and the organization rights of employees were guaranteed by law in order to get collective bargaining started. Only a "one-sided Act" would achieve the desired objectives and the Wagner Act was deliberately one-sided.

The government threw itself directly into the industrial-relations picture when it decided to help employees organize. It took this step in response to the widespread belief that "there ought to be a law!" to prevent the unilateral determination by management of the terms of employment, which prevailed rather generally under individual bargaining. It rejected the notion that, while employees had a right to organize, management could discharge those who actually joined a union.

Once the workers were organized and collective bargaining got under way, unions and management were expected, as a matter of self-interest, to agree upon terms of employment equitable to both workers and employers. Collective bargaining was thus conceived as a sort of self-effectuating process of agreement-making. The great faith expressed in collective bargaining was scarcely justified by later events.

In view of the depressed economic conditions of the early 1930's, it is noteworthy that such a limited degree of gov-

ernment intervention came about in 1935. No really serious thought was then given to the possibility that the lot of workers might be improved by the government's determining directly what the terms and conditions of employment should be⁴—this at a time when the country was just emerging from a critical depression in which standards of employment had been badly shattered.

In adopting collective bargaining as its panacea, our government acted upon the deeply held belief that "he governs best who governs least." The greatest challenge of collective bargaining lies in the opportunity it gives to confirm that belief in the field of industrial relations. Collective bargaining is a form of industrial self-government.

Organization of employees *for* collective bargaining was the limited purpose of the Wagner Act. In appraising the advantages of a government policy designed along these lines, differentiation between purely organizational activities and the actual conduct of collective bargaining cannot be carried too far. Legally imposed rules governing employee organization can have an important bearing upon the relative economic power brought by unions and employers to the conference table. Commonly recognized "equality of bargaining power" cannot in fact be effectuated by a law. Whether the government intervention unduly tips the scales is always bound to be a disputed point when organizational rules are prescribed. Such a dispute arose under the Wagner Act and continues under the Taft-Hartley Act.

When the government passed the Wagner Act to increase the power and the ability of employees to take care of themselves, employers vehemently contended that unions were actually given an undue and an unwarranted strength. It was claimed that unions amassed a power to dictate the

⁴ An exception was the Fair Labor Standards Act of 1938, which required the payment of minimum wages to protect employees against substandard conditions of living and also made overtime pay mandatory, after 40 hours a week. Employee demands for a shorter work-week were assisted even though the object of the hours limitations was to "spread employment."

terms of employment. Organized labor retorted that employees were unable to secure an "equality of bargaining power" even under the protective wing of the Wagner Act.

Conflicts over the conditions precedent to collective bargaining, as established by the government, can be most serious. There is considerable experience on this point. And attainment of labor or management objectives in these conflicts depends upon political power as well as upon economic strength. A law was made an issue of industrial relations when the Wagner Act was passed. The tides of fortune have swept over this issue first one way and then another in response to relative political power. This situation is an inevitable result of government intervention, even when it is limited to the organizational steps taken under the Wagner Act.

Sharp differences about the equity of government-prescribed prerequisites for collective bargaining brought suspicion and resentment to many a negotiating table. The chance that joint dealings might be successfully worked out were greatly diminished. Every amendment of the Wagner Act demanded by management to effect "a real equality of bargaining power" was interpreted by organized labor as a "union busting" activity.

Oddly enough, no purposeful consideration was given by either side to the advantages of gradually repealing the Wagner Act as its limited purposes were achieved. Yet that Act could logically enough be viewed as a sort of protective tariff to help an infant industry. The protection it accorded employees in their organizational efforts might safely have been removed as unions were organized and permanently established. The absence of any real attention to an industrial-relations policy of "less government" perhaps indicates the power of the trend toward government direction and control of industrial relations.

In any event, rules for union organization were continued and greatly expanded when the Wagner Act was supplanted

in 1947 by the Taft-Hartley Act. More detailed regulations to effectuate a new concept of "equality of bargaining power" were among the many government regulations now promulgated by the Taft-Hartley Act. Government regulation of union organization is thoroughly embedded as a part of the national labor policy.

The Wartime Program

Effectuation of the national labor policy enunciated in the Wagner Act was scarcely well under way when World War II erupted.⁵ More sweeping government intervention was inevitable. It came about long before a thorough test could be made of that policy under which government's role was restricted to protection of the rights of employees to organize. The next step, direct intervention into the actual conduct of collective bargaining, became a wartime necessity.

Strikes and lockouts could no longer be used to settle private disputes. Lost production would too seriously endanger the war effort and the national safety. Nearly everyone recognized that machinery had to be established by the government to set the terms of employment whenever the parties could not agree. In addition, restrictions upon the terms of employment themselves were finally laid down. Wage determination had always been a private affair between employees and management. During the war, control of wages was an integral part of the general program established to minimize the consequences of wartime inflation. Industrial relations simply couldn't be conducted through free collective bargaining during the war.

Restrictions upon collective bargaining for the period of the war emergency were fortunately accepted voluntarily by organized labor and by management. Their representa-

⁵ Although the Wagner Act was passed in 1935, its acceptance by many employers was deferred until the Supreme Court upheld the constitutionality of the Act in 1937.

tives on the War Labor Board even assumed a large measure of responsibility for designating and administering the restrictions which were to prevail. Industrial relations were not based upon collective bargaining during the war. They were conducted, however, in the collective-bargaining tradition of compromise and agreement. Various conflicting necessities of the parties were accommodated in the formulation of government regulations.

Out of these circumstances came the distinguishing characteristics of government intervention in industrial relations during World War II. Collective-bargaining rights were given up in conformance with voluntary agreements between labor and management representatives. Government regulation, instituted with the acquiescence of the parties directly affected, came to be known as "voluntarism."

Widespread support was given to the principle of voluntarism during World War II by most of organized labor and by the great majority of management representatives. Both sides supported government intervention based upon voluntarism in the belief that the alternate course, imposition of employment terms by the government, would produce no sound industrial peace and could jeopardize the private enterprise system of production.

One may question whether the wartime policy of government intervention has any long-run significance. Isn't the war over? Wasn't it understood that wartime restrictions would be for the emergency only? Affirmative answers can be given to these questions without disposing of the possibility that other duties and new responsibilities related to peace-time conduct of collective bargaining can be voluntarily assumed by labor and management as an alternative to government direction of their affairs.

In these days when the current runs strongly toward extension of the government's jurisdiction, it is fashionable to dismiss voluntarism as an impractical and idealistic prin-

ciple. Ample support for such a discouraged view can be found in the postwar record of labor and management disagreements. The fact still remains that, during the war, the dilemma of how to bring the government into industrial relations in order to protect the public interest without supplanting the private rights of labor and management was effectively resolved by an intervention authorized by voluntary agreements between the parties directly affected. In contrast to the Taft-Hartley Act, the overwhelming advantages of voluntarism to all parties may become so apparent as to make labor-management agreements on broad policies appear to be the best way out.

The effectiveness of voluntarism should not be unduly glorified in view of its rejection by the National Labor Management Conference of 1945. Neither should this approach to a national labor policy be minimized in view of the relative success of the wartime labor program. From the establishment of the National Defense Mediation Board on March 19, 1941, until the adjournment of the President's National Labor-Management Conference on November 30, 1945, collective-bargaining rights were drastically limited but in conformance with the voluntary agreement or acquiescence of labor and management. Under governmental auspices, unique mediation and arbitration procedures were utilized and broad policies were evolved to settle the most crucial issues of industrial relations. The restrictions which labor and management then voluntarily accepted in the public interest were, in a number of important respects, actually much more drastic than those imposed by the far-reaching Taft-Hartley Act.

Labor and management fully realized in December 1941, that, irrespective of any consequent inequities, their private interests had to be subordinated to the needs of a country at war. Such a powerful motivating force cannot be duplicated in peacetime. But, lasting significance can be given to those factors other than patriotism that contributed so

heavily to the relative success of the wartime program. Government intervention produced worth-while results largely because it was voluntarily accepted by labor and management and because these parties participated in working out and administering the necessary rules and regulations. One way of adapting collective bargaining to the public necessity is through broad policy agreements between labor and management. This is the fundamental lesson of the wartime program.

The President's Labor-Management Conference was convened in 1945 on the assumption and with the hope that voluntarism would be a tower of strength during the re-conversion period as it had been during the war. With the failure of that conference to set up any machinery for the peaceful settlement of impending labor disputes, the whole idea of voluntarism was commonly adjudged as a wartime policy that was valueless in peacetime. This may have been a premature judgment. Voluntarism remains as the sound approach to the problem of developing a national labor policy. Effectuating the idea of voluntarism, as conceived during World War II, remains the great challenge to those in the ranks of labor and of management who desire to keep governmental direction of their relationship at a minimum.

Labor Management Relations Act of 1947

The fundamental significance of the Taft-Hartley Act is in its far-reaching extension of government control over industrial relations. So broad is the jurisdiction of government under that Act that it raises serious questions about whether or not collective bargaining is destined to be largely supplanted by government directive. For the present at least, the notion that "there ought to be a law" is in the ascendancy over the idea that "he governs best who governs least."

Doubts about the future of collective bargaining would

not be nearly so serious had Congress confined its postwar legislation to those sections of the Taft-Hartley Act that amend and add to those rules governing the organization of employees that were previously established by the Wagner Act.⁶ Additional aspects of industrial relations have now been thrown into the political arena. This results particularly from those sections of the Taft-Hartley Act that extend government direction well into the collective bargaining process itself. Government jurisdiction has been extended, moreover, without the approving support of voluntary agreements between labor and management.

Under the 1947 Act, the government prescribes procedural rules applicable to the conduct of collective-bargaining negotiations. It proscribes certain uses of economic power in cases where labor and management are unable amicably to resolve their differences. It decides a number of substantive issues that commonly arise in collective bargaining. The terms upon which issues over union security and welfare funds can be settled, for example, are now specified by law. Labor and management no longer possess latitude in resolving these issues in accordance with their own judgment or through the exercise of their own economic power.

The actual extension of government control over industrial relations is not nearly as significant as the direction of the steps taken. A drastic change in national labor policy was a prerequisite to taking those steps. Government jurisdiction over industrial relations had to be made virtually all-inclusive. This was done.

One purpose of the Taft-Hartley Act is expressly stated as being "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce." Other specific objectives are to "define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare and

⁶ Even so, the importance of political power in the establishment of regulations for employee organization would have been sharply underlined.

to protect the rights of the public in connection with labor disputes affecting commerce." Another Congress at another time may have unanticipated ideas about the legislation essential to attain these stated objectives.

A national labor policy grounded upon the philosophy of the Taft-Hartley Act makes it no longer possible to designate with assurance any subject of industrial relations as one that organized labor and management must work out in their own way. Collective bargaining is not the main foundation of industrial relations. The law is the cornerstone. The national policy now on the statute books tends, therefore, to make political power rather than economic power the ultimate determinant of the issues of industrial relations. Regulations established by Congress in the Taft-Hartley Act can be changed, if found to be constitutional, only by another Act of Congress. And, with Congressional jurisdiction so broadly defined, labor or management has been invited to seek from Congress those "concessions" that are not forthcoming in collective bargaining.

The Contrasting Policies

Our efforts at government direction of industrial relations have not been numerous. They do illustrate several contrasting philosophies. One can fortunately look them over before making a final choice as to the kind of long-run national labor policy that is in the best public interest. On the basis of actual experience, a selection can be made from three kinds of programs.

Under the Wagner Act, government intervention was substantially limited to assisting the organization of employees into unions. The essence was a highly restricted form of intervention confined to the preliminaries of collective bargaining. During the emergency of World War II, collective-bargaining rights were modified and obligations designated by government regulations made in conformance with voluntary agreements of the parties. The

government intervened in industrial relations beyond the specification of organizational procedures primarily only to an extent that was compatible with the voluntary agreements made by labor and management. Government-managed collective bargaining, as inaugurated by the Taft-Hartley Act, is a policy in marked contrast to anything that has gone before. With the passage of the Taft-Hartley Act, the government assumed extensive jurisdiction over the rights and obligations of labor and of management in their collective-bargaining relationships.

Getting a unanimous agreement upon a certain policy as the soundest determination of the role of the government in industrial relations has not been possible. Wide differences spring from divergent convictions about the criteria that should be used in measuring the successes and the failures of collective bargaining. A person who believes that government intervention should be avoided at virtually all costs has one standard of measurement. Another, convinced that the exercise by labor and management of their private rights should impose no burden at all upon the general public, uses an altogether different standard. Despite these and many other widely contrasting views, one basic conclusion has emerged in the past few years. Survival of collective bargaining as an institution depends upon the ability and the willingness of labor and management to conduct their joint relationships with an increasing regard for the public interest. If such a result is not assured by voluntary agreements, the public interest will be provided for in government directives.

FREE COLLECTIVE BARGAINING

The inadequacies and the insufficiencies of free collective bargaining in meeting the industrial-relations problems of our day give rise to the dilemma about the role of the government. Modification of free collective bargaining is the task at hand whenever any program for government regula-

tion is being worked out. Government control carries a price just as collective bargaining does. The critical question is: What phases of industrial relations can be handled more effectively by the government than by labor and management operating on their own?

The most helpful starting point in grappling with the question is to clarify just what is meant by "free collective bargaining." The phrase has a particular connotation which should be made clear at the outset. Under free collective bargaining, designating the terms and conditions of employment is a private matter for a union and a management to work out between themselves in whatever way they see fit and particularly without government interference.

Substance has to be given to the rather formal statement just suggested. That can best be done by noting the three most important aspects of the joint dealings between labor and management that are worked out in free collective bargaining. They are determinations of (1) the scope of the labor agreement, (2) negotiating procedures, and (3) substantive contract terms. All three aspects are vital parts of the relationship. Resolution of differences in each one of these areas is looked upon as a private matter to be worked out by a union and a management under a system of free bargaining. Legislation dealing with any one of these areas constitutes a substitution of government directive for collective bargaining.

Scope of the Agreement

Subjects to be discussed in negotiations and those to be covered by the labor agreement are designated by the parties themselves when free collective bargaining is practiced. Some labor contracts are simple one-page documents covering little more than union security, wages, and hours. Others are voluminous tomes dealing with a wide variety of working relationships. Extreme differences in subjects included in labor agreements arise not only from varying eco-

conomic conditions between industries but also from distinctive philosophies within both labor and management ranks. Ideas differ widely about what are matters "of mutual concern."

The scope of collective bargaining may give rise to highly critical issues. Management has frequently contended, for example, that demands for health insurance or for a guaranteed wage, to mention but a few, are not proper subjects for joint consideration. A vital question is then raised. If such issues are actually held to be "beyond the limits" of collective bargaining, they have either to be dropped without attention or submitted to another forum. The legislative forum is the obvious alternative.

Disputes about the propriety of encompassing certain subjects within the collective-bargaining relationship are to be sharply differentiated from disagreements over the substantive terms for dealing with a problem. Company negotiators staunchly resist "even talking about" profits, sales prices, or any other subject that they believe cannot be introduced into collective bargaining without seriously interfering with management's ability to perform its functions. A close involvement of management security with most disputes over the scope of the agreement give such issues their most distinctive characteristic.

It will be recalled that the Hartley labor bill, as initially passed by the House of Representatives in 1947, would have modified free collective bargaining by specifying the exact subjects which could legally be encompassed within the collective bargaining relationship.⁷ This was a proposal for a particularly far-reaching form of government intervention. Under free collective bargaining the parties in each negotiation have the right to determine for themselves what subjects are to be dealt with jointly. This carries a risk

⁷ These provisions were eliminated by the Joint Conference Committee which worked out the Taft-Hartley Act finally passed by Congress in June, 1947.

that either party may resort to a strike or to a lockout in order finally to resolve differences over the scope of collective bargaining. A party anticipating the loss of such a test of strength may look to the government for assistance even though collective bargaining might thereby be vitiated.

Negotiating Procedures

A union and the management with which it deals are also charged with full responsibility for setting up their own negotiating procedures when free collective bargaining prevails. Meetings may be frequent or infrequent, formal or informal. They may be characterized by sweet reasonableness or by strong-arm methods. It is up to the parties themselves to develop whatever procedures and methods they consider adequate for handling their affairs.

Specification by the government of legally required procedures for joint dealing does not appear at first glance to constitute any particularly serious interference with bargaining rights. Such intervention could actually constitute a fundamental interference. Government-supervised procedures will invariably be looked upon as a benefit to one side and as a detriment to the other. As a general proposition, one may expect that prescribed ways of settling a dispute, other than by a test of economic strength, will have the greater appeal to the weaker party, whether it be labor or management. So, the specification by government of procedural machinery of any sort is in the direction of helping the weak and hobbling the strong.

By so influencing the relative economic power of the parties, imposed rules of procedure can even strongly condition the terms of employment that are finally evolved. This was one of the principal complaints made by employers about the Wagner Act. Amendments to the rules of union organization, as made by the Taft-Hartley Act, to meet these employer complaints, will again fail to produce an "equality of bargaining power" accepted by all as fair.

Many more collective-bargaining procedures are now legally required under the Taft-Hartley Act. They relate to the actual conduct of collective bargaining for the negotiation of renewal agreements. There are also general terms requiring negotiations "in good faith," which will be given substance through decisions of the National Labor Relations Board. Governmental determination of negotiating procedures has been added to government regulation of the organizing process. There are, in consequence, many more reasons to advance in support of charges that government-required procedures adversely affect the economic bargaining power either of organized labor or of management.

Substantive Terms of Employment

In addition to scope and procedural questions, the manner in which particular issues are substantively determined is a private matter between labor and management under a free collective-bargaining system. The parties have the widest kind of latitude in resolving the issues recognized by them as falling within the scope of their joint dealings. A similar problem may be settled in quite different ways in various industries and plants. The answer will depend upon the needs of the situation as appraised by a union and a management as well as upon relative economic power. The union security question, for instance, has been variously resolved. Agreements have been made for the closed shop, the union shop, maintenance of membership, a so-called preference shop, or by a simple statement of purpose in general terms. The parties themselves are expected to make whatever arrangements are best suited to their particular needs and circumstances.

Government intervention into industrial relations may include the specification of substantive terms for settling particular disputes. The Taft-Hartley Act, for example, provides for the exact kinds of clauses respecting union security and welfare funds which can legally be incorporated

into labor agreement. Labor and management latitude in dealing with these issues is either restricted or eliminated. A blanket judgment as to the merits of the contesting claims has already been made by the government. This has been done through establishment of a general principle to be applied without any regard to the facts or the individual merits of any particular case.

Summary of the Components of Free Collective Bargaining

The essence of free collective bargaining is that the scope of the relationship, the procedures for negotiation and joint dealing, and the substantive terms of employment are all private matters to be worked out by unions and management without government interference or direction. The government may attempt to conciliate differences in each of these areas but that is all it may do.

It can even be said that free collective bargaining is whatever the negotiators in each case make it out to be. They have great latitude in composing their differences on the assumption that only they are in a position to work out practical solutions to their problems. Collective bargaining as a national policy simply means that organized labor and management are permitted and expected to compose all their differences over subjects of mutual interest by understanding, compromise, and agreement. They may do so by means and under terms which seem best to them. Collective bargaining and industrial self-government are thus synonymous terms.

THE FUNCTION OF STRIKES AND LOCKOUTS

Economic force is a prime motive power for agreements in free collective bargaining. Industrial relations remain a private matter between a union and a management even when they are unable amicably to compose their differences.

Trial by economic combat may be freely chosen as the way to resolve issues that persist despite all the "give and take"

of the conference table. Either party can direct economic pressures against the other in an attempt to force acceptance of terms rejected in negotiations. They may go further. Either party may seek to impose terms upon the other by economic pressure without making any bona fide attempt to work out a settlement through peaceful negotiations. In other words, economic pressure can be used as the primary means of resolving issues rather than as an instrument of last and reluctant resort.

Whether to rely primarily upon peaceful negotiations or industrial warfare is essentially a private decision for labor and management to make. The choice is strongly weighted, however, in favor of peaceful negotiations. Avoidance of the risks and the costs of industrial warfare is a strong inducement for the parties to work out peaceful settlements.

Self-interest ordinarily makes for earnest negotiations. There have been times, however, when slugging it out first and negotiating afterward has had advocates on both sides. One of the times was in the months following the end of World War II. The consequences included a general public dissatisfaction with collective bargaining and a widespread demand upon the government to "do something" to restrict the rights of labor and management to engage in private warfare.

Some abuses of the rights to strike and to lockout, and some unintelligent uses of these powers, are inevitable. They are part of the cost of keeping industrial relations in private hands. Many persons, unfamiliar with industrial relations, find it difficult to accept any such view. Work stoppages, especially when they become numerous, patently seem to be so economically wasteful as to call for their forthright elimination.

Only upon counting up alternate costs of the usual proposals for strikeless systems does it become clear that some labor policies can have consequences far worse than strikes. One of the alternate costs is the scrapping of collective bar-

gaining. No one should have any doubt about the unlikelihood that collective bargaining can be maintained in the absence of the rights to strike and to lockout.⁸ Nor can free collective bargaining continue if strikes and lockouts actually undertaken are not permitted to run their course and thus serve their function of bringing the parties to terms.⁹

The risks and the costs that go with a stoppage of production are vital parts of a collective bargaining system. They are penalties for failing to agree. Moreover, once a strike or a lockout is actually begun, the heavy costs of unemployment and of idle plants exert strong and constant pressures for a settlement. Since an agreement has to be made before wages and profits can be earned again, adamant positions are modified on both sides. Acquiescence in the terms of employment after a strike may come from sheer exhaustion and as a result of capitulation by one side. But the terms of settlement, whatever they are, will not be dictated or imposed by an outside or governmental agency. Employees must finally agree, however reluctantly, to the terms at which they will work. Management must finally agree, even with regret, to the conditions under which its plant will be operated.

Related as it is to relative economic power, a final settlement reached in collective bargaining may not be fair and equitable by comparison with standards championed by labor, management, or the government. Fairness and

⁸ Some union leaders contend that lockouts no longer occur in the sense that an employer takes the initiative in closing down jobs in order to force employee acceptance of the terms he offers. They say the employer now simply rejects the "demands" made upon him and puts the union in the position of deciding whether or not to interrupt production by calling a strike. A decrease in use of lockouts has become most pronounced in recent years. The union has sought changes in conditions but the employer would like a continuance of previous arrangements. The lockout could again become the *modus operandi* for a stoppage if the employer should seek "concessions" while the union demanded a continuance of previous terms.

⁹ The performance of this function is assisted and not impeded by conciliation efforts designed to bring about a rapid termination of a strike.

equity have substance in collective bargaining ultimately in terms of what is achievable by a balancing of relative economic power. The results, it may be assumed, will often be in marked contrast to what would be imposed under some government-determined standard of fairness and equity. The ultimate arbitrament then would depend not upon relative economic power but upon relative political power.

From the public standpoint, a principal value of the private bargaining system is that the promulgation and application of sanctions and penalties are not necessary to insure that the parties live up to government-imposed terms. This value is lost whenever the government steps in and orders the termination of strikes or lockouts. The big trouble with that kind of a procedure is that the government must then make the decision as to the terms upon which men will labor and upon which the employer will run his plant. Relative economic power does not fulfill its function of forcing an agreement between the parties. A strong public desire to avoid the use of coercion in support of government-directed terms of employment gives a dogged staying power to the idea of collective bargaining and underlies the widespread support accorded the right to strike in our country.

In addition to insuring against "outside" imposition of employment terms, the right to strike has one other vital function to perform. As mentioned previously, it serves as a motive power to induce peaceful settlements. A desire to avoid the substantial costs of a production stoppage, including the risk of losing a strike, constitutes the most effective inducement ever devised for compromise and agreement around the conference table. Each party has a strong self-interest for arriving at a settlement even though many "concessions" have to be made.

As an inducer of peaceful settlements, the right to strike is most effective when the parties know that a work stoppage, actually called, will continue until an agreement is

reached. The greater the risk, the more reason for compromise and agreement. If the known policy of the government is to intervene promptly in order to prevent any protracted stoppage of production, as during the war and shortly thereafter, the risks of a shut-down are minimized and the reasons for compromise and agreement around the conference table can quickly disappear.

A right to engage in industrial warfare is essential to the cause of industrial peace under the collective-bargaining system. Such a notion is perplexing and anomalous. It is, nevertheless, a very practical principle in a world where the golden rule is still far from accepted as a universal guide for conduct. Many a labor agreement is not signed until "one minute before twelve," after last-ditch positions have been taken by both sides with an eye to what it is worth in "concessions" to avoid a shut-down.

Searching questions have been raised about the practicability, in our complex economic system, of an industrial-relations policy in which the rights to strike and to lockout play such crucial parts. Disrupted production entails the payment of such a high price by everyone concerned that, more and more, people conclude: "Strikes are becoming obsolete." That could easily be true, without leading to the conclusion that the right to strike is obsolete.

Without permanently conceding any of their rights, labor and management can voluntarily recognize and accept limitations upon the exercise of strike and lockout rights. They do so all the time. The emergency program of World War II is a notable example. Every agreement with a no-strike clause and every stipulation for voluntary arbitration provide illustrations of voluntary restrictions on the use of economic force. What is needed more than anything else in industrial relations is for management and labor to set up their own machinery for settling disputes wherever a strike or a lockout entails an undue social cost.

Another doubt about the efficacy of collective bargaining centers about the kind of employment terms it produces. Can a reasonable degree of fairness and equity ever typify conditions of employment derived from agreements based upon relative economic power? Won't terms always be "imposed" by one party on the other? Isn't there some better way to measure "fairness and equity" than through a balancing of economic power? Wouldn't more equitable results obtain if strikes were outlawed altogether and if disputes over employment terms were settled by compulsory arbitration or by special labor courts set up by the government? These are not rhetorical questions. They can and should receive direct answers.

FAIR AND EQUITABLE SETTLEMENTS

Specification of employment terms by compulsory arbitration or by labor courts is an unsound proposition simply because there are no objective criteria or standards for deciding what are fair and equitable conditions of employment. Criteria aplenty have been suggested. They unfortunately give widely conflicting results. None of them is universally or even commonly accepted as clear and unmistakable guides for meting out fairness and equity. There is no law to apply. A little thinking about the nature of wage disputes, taken as an example, makes this eminently clear.

Personal and group ideas about what constitutes a fair wage vary "all over the lot." Cost of living changes, ability to pay, comparative wage rates, and a score of other measurements are probably used more for rationalizing a wage position than for actually determining it. A wage to maintain or increase employment under a given set of economic conditions is sometimes suggested as the soundest criterion for resolving differences. Even this pragmatic approach has been used to justify widely varying wage policies depending upon one's regard for the purchasing power theory. Differ-

ent theories of wage determination abound. Decisions of a labor court would depend more upon the economic theories held by the arbitrators than upon any law or legal doctrine.

To add to the complexities, a worthy objective of each labor union is to secure an improved standard of living for its own members. Not for "labor" in general but for the members directly served. Competition among unions in the pursuit of this objective has been intensified in recent years. A contract hailed as the "best yet" when consummated may be vigorously denounced as "unfair to employees" when it expires. Wage determination is not a matter of judicial interpretation. It consists of applying inadequately developed economic principles to the furtherance of industrial and human progress. How quickly can sound economic progress be achieved? That is the judgment which has to be made in critical wage cases.

These various pressures, combined with the notable economic progress of our country, have resulted in rapidly changing and more exacting standards of fairness and equity. Business recession and depression may pare down gains previously achieved by employees. But over the years, standards of economic justice have steadily increased as the possibilities of the country's productive resources have been revealed and extended. Many labor disputes center fundamentally around a demand for a change in previously accepted standards of fairness and equity. A few examples may be cited.

Portal-to-portal pay for coal miners, for instance, seemed to be unachievable in 1938. Neither the miners' union nor anyone else became aroused over the issue. By 1944, when a dispute about this issue was dramatized, the country by and large suddenly concluded that "of course miners ought to be paid for their underground travel time." A new standard of economic justice was established. As another example, a shift may be noted in public attitude toward the employee demand for guaranteed wages. Until recently,

the subject was one for academic discussion only. After the full productive potential of American industry was demonstrated during World War II, serious recognition was given to the elements of equity in employee claims for a steady income.

Improving standards of employment have characterized industrial relations in our country where economic progress is taken pretty much for granted—perhaps too much for granted. Elusive and changing concepts about what constitutes fairness and equity affect the manner in which labor disputes over the terms of agreement can be adjusted. They do not lend themselves to judicial interpretation based upon prevailing practices or any other rigid measures.

To be sure, disputes over the interpretation and application of the terms of an existing labor agreement call for a particular kind of quasi-judicial determination. Most disputes over the terms of a future labor agreement do not. Making a labor agreement is much more akin to the legislative process. New conditions and new relationships are created in response to a changing environment.

Working out a labor agreement has also been compared with the consummation of any private contract. Many of those who argue most insistently for the establishment of labor courts would understandably rush to the defense of the private-enterprise system were it ever seriously proposed that buyers and sellers of automobiles should be required by law to accept a court determination of their differences over terms of sale. The analogy is not exact. Buyers and sellers of labor have no real alternative but to do business together. And the labor contract affects the public interest more directly. Contract-making instead of contract interpretation is, nevertheless, the process upon which industrial relations are grounded. Disputes arising out of contract-making are not subject to judicial determination.

Negotiations for a labor agreement are thus undertaken to make the "law" of industrial relations for a plant or for

an industry. The collective contract of employment embodies this law. Recognition of the law-making characteristics of collective bargaining is a condition precedent to a solid grasp of the fundamental problems of industrial relations.

Rules governing conditions of employment can be particularly adapted to the needs of an industry or a plant only if they are promulgated through private contracts between the parties directly affected. Economic power is then the ultimate determinant. The law governing conditions of employment may also be set forth by the legislature. In that event, rules will tend to be provided for uniform application to all industries and all plants irrespective of their individual necessities. Political power becomes the ultimate determinant. In neither case do objective criteria of fairness and equity provide standard points of reference.

Negotiators may, and often do, voluntarily agree to accept the judgment of an arbitration board as to what constitutes a fair and equitable determination of their differences over new contract terms. The rules of procedure and the criteria for decision to be followed by such a board can then be specified by the parties themselves. They also voluntarily decide that the judgment of their own arbitration board is preferable to working out certain of their differences by a test of economic strength. Such arbitration procedures are initiated by the parties themselves and for a particular case. Voluntary arbitration is thus, by its very nature, an adjunct to collective bargaining. It is as far from compulsory arbitration as the difference between the poles.

Compulsory arbitration has irreparable defects. It has to operate in the absence of any generally accepted criteria for decision-making and with a lack of voluntary acceptance by the parties of the judgment that has to be made. Sanctions and penalties have to be provided for whenever compulsion is accorded a place in industrial relations. Well-intentioned as the decisions of a labor court might be, its

decisions would invariably be viewed by one party or the other as "arbitrary." To be sure, it could be made illegal for employees concertedly to refuse employment under imposed terms or for an employer to close down his plant in protest of them. The trouble is that classification of these acts as illegal runs entirely counter to our deep-seated philosophies about the way men should live and work together. One can readily understand the fervor of the cry: "Compulsion will not work." At the same time, compulsory arbitration provides no more objectivity than economic strength as a way of defining fairness and equity.

These simple but fundamental factors confound the search for a workable alternative to economic power as the ultimate determinant of fairness and equity. With all its imperfections, collective bargaining emerges as the soundest method for settling labor issues.

It doesn't follow that experiences with collective bargaining over the past several years cannot be improved upon. There is an urgent need for labor and management, with government assistance, to conduct their relationships so that the actual use of economic power to define fairness and equity is a method of last resort in practice as well as in theory. Voluntary arbitration procedures have to be developed as effective substitutes for work stoppages that create a public emergency. Acceptance of these policies by both labor and management has become a matter of self-interest. At stake is their possible abdication to government of the direction of industrial relations.

CRITICAL SHORTCOMINGS OF COLLECTIVE BARGAINING

Trends in government regulation and control depend largely upon how well collective bargaining operates. A pattern of negotiated settlements, made with at least a reasonable regard for the public interest, can provide the most compelling argument for limited government intervention. Examina-

tion of the possibilities for improving collective-bargaining relationships is an integral part of this analysis of the government control of industrial relations.¹⁰ Action taken by labor and by management to make collective bargaining work may well be looked upon as the unfolding of industrial self-government.

There is considerable experience to show that labor relationships can be typified by intelligence and by restraint in the use of power. Collective-bargaining practices in the needle trades are among the notable examples.¹¹ Numerous other instances can be cited in which labor and management are fully cognizant of the restrictions imposed upon them by their compelling obligations to the public. As one of a host of illustrations, reference is made to the extensive use of voluntary arbitration in the public-utility industries where unions and management have an extraordinary duty to provide continuous service. Industrial self-government is not just a theoretical concept; it is being extensively developed and with a high degree of statesmanship.

One can never lose sight of the fact, however, that an altogether different kind of relationship may be chosen either by labor or by management. Conditions of employment can reflect a determination of one party or the other to exact, by a preponderance of economic power, whatever the traffic will bear at a given time and quite irrespective of long-term consequences. Strike first and negotiate afterward can be selected as a standard procedure. "Inequities" perpetuated or created by such an emphasis upon belligerency sooner or later create a demand for the elimination by law of the harsh results. The demand may arise with labor, management, or the public. This we know from the experience of the past fifteen years.

¹⁰ This aspect is given detailed consideration in Chapter VII.

¹¹ Reference is to the relationships prevailing between the Amalgamated Clothing Workers of America, (C.I.O.) and the manufacturers of men's clothing as well as those between the International Ladies' Garment Workers Union (A.F.L.) and the manufacturers of women's dresses.

The failures of collective bargaining, and not its successes, have been heavily accented in the last few years. The rash of strikes in 1946 guaranteed this. Some of the strikes showed clearly that, under certain conditions, labor and management simply cannot exercise their private rights without irreparable harm to the public interest. This did not always prevent an exercise of those rights. The public demand upon Congress to do "something" became increasingly insistent. Because organized labor was on the march, restrictions upon union power was the "something" which seemed to be necessary. It was further assumed that the "excessive power" of the unions, which had to be "cut down," derived principally from the Wagner Act.

The Wagner Act was doubtless a major contributing factor to the increase of union influence in recent years. Of equal or greater importance was the unprecedented economic strength that came with a demand for labor in excess of its supply. Costs of living were increasing by leaps and bounds while profits of industry were never better. Labor's economic power was consequently at an all-time peak. The Wagner Act was not the sole and perhaps not the main cause of extensive labor organization or of gains secured in collective bargaining. The economics of the situation was a principal impetus behind both developments.

Even individual, unorganized workers possessed a formidable bargaining power which had to be reckoned with by many an employer. During the war, and following it, individual bargaining wasn't at all in the nature of the unilateral determination by the employer which had come to be associated with nonunionized plants. The lever of alternate job opportunities gave individual employees a potent voice in determining the conditions under which they would work.

Such basic economic considerations were almost entirely overshadowed, first, by the simple fact that strikes could not be tolerated while the nation was at war, and later, by the unduly heavy cost to the public of strikes during the

reconversion period. The Wagner Act was inordinately blamed for unsettled labor relations and sweeping changes in it were widely demanded.

The concept of industrial relations as an exclusively private affair between labor and management was challenged along many lines. Terms of employment agreed to by a union and a corporation, both often giant organizations, might suit these parties very well indeed. Each might be convinced that the best possible deal for itself had been made. But, is a peaceful settlement the only demand made upon labor and management by the public interest? Should the terms of settlement also assure an ample supply of goods at a reasonable cost? So-called "feather-bedding" arrangements for stand-by musicians and for local pilot drivers to bring out-of-town trucks into the center of a city were not very reassuring. They added to growing doubts about the efficacy of collective bargaining.

The most perplexing question of all concerned strikes. Something had to be done to eliminate those strikes that affected the public interest so adversely that work stoppages could not be permitted to run their course. In other words, some strikes could not be permitted to perform their function of bringing the two sides to terms. Both employer and employees could hold out longer than the public. Industrial relations are not a private affair to the extent that labor or management can fight their own war, in some cases even without a bona fide attempt to secure a peaceful settlement, if the result is to cripple a whole community or the entire nation. This conclusion was reached by a great majority of the public in 1947.

Frequent coal strikes, and the almost continuous threat of them, forced the decision but there were other contributing factors. Risks arising from a simultaneous shut-down of all the producing units in basic industries, or from strikes in vital public utilities, brought a realization that some forms of economic pressure could not long be endured by the public. The nation-wide railroad strike and the shut-down

of electric utility services in Pittsburgh in 1946 accentuated a growing belief that collective bargaining was inadequate. These strikes placed much more pressure upon the government to intervene and decide the issues in disputes than upon the employer to accept union demands. Yet an imposition of the conditions of employment by government is exactly what collective bargaining is supposed to avoid. Collective bargaining is an institution which carries the seeds of its own destruction.

It has become apparent that the theory of free collective bargaining stops short of explaining how the use of strikes and lockouts can be reconciled with the over-riding right of the community to carry on its life and work. Discernment of the theory's limitation doesn't settle anything. It does raise a new and difficult problem. How can collective bargaining be made to work where a stoppage of production is not, in fact, available finally to resolve a labor dispute?

The most significant experience in grappling with this question occurred during World War II. Setting up machinery by voluntary agreement of the parties for the peaceful settlement of disputes was then found to be the only sound way of resolving the dilemma. Since labor and management were unwilling or unable to act upon this principle in the postwar years,¹² the government sought out other devices. That does not mean that labor and management will not ultimately face up to their responsibilities. A program for doing so would be a logical consequence of the difficulties created for both labor and management by the Taft-Hartley Act.

GOVERNMENT CONTROL VS. COLLECTIVE BARGAINING

The Taft-Hartley Act became law in June 1947. Free collective bargaining was thereby largely "written off" as a

¹² An opportunity for them to do so was afforded in the President's Labor-Management Conference of 1945. For a discussion of this Conference see Chapter V.

procedure that could be depended upon to create sound industrial relations with adequate protection of the public interest. An overwhelming majority of both houses of Congress supported extensive government regulation of labor-management affairs when that was demanded by the country at large. As a result of these judgments, questions about government control of industrial relations rank among the most important of all domestic problems. Is collective bargaining destined in the future to play only a minor part in establishing the conditions of employment? Are major issues of industrial relations to be settled more and more by the government?

These are consequential questions. Their significance extends far beyond the industrial relations field. They bear upon the larger question of the relations between the people and their government. It is high time to realize, therefore, that conscious and purposeful efforts have yet to be made by organized labor and by management to develop fully the agreement-making potentialities of collective bargaining.

Attempts made to arrive at broad policy understandings, as at the National Labor-Management Conference of 1945, only indicate the latent possibilities in this kind of joint undertaking. Experience shows, moreover, that in every individual labor-management relationship, differences can be narrowed and agreement made more likely when the parties concentrate their efforts to develop a "know-how" about collective bargaining. They can consciously adopt procedures which minimize differences. The job of transforming collective bargaining from a mere guarantee of "no government intervention" into a constructive and indispensable institution has barely gotten under way. Whether or not industrial self-government will suffice is still the challenge.

Advocates of collective bargaining have a much greater responsibility than simply voicing their opposition to government regulation. What they are *for* is every bit as im-

portant as what they are *against*. The conscious and purposeful development of collective bargaining into a process that produces negotiated agreements, made with full regard for the public interest, is the most constructive industrial-relations program available to labor and management. Once such a program is undertaken, policies for government intervention into industrial relations can be developed with a view to strengthening and facilitating collective bargaining instead of supplanting it.

Chapter II

ORGANIZING FOR COLLECTIVE BARGAINING

COLLECTIVE bargaining was formally adopted as the cornerstone of the national labor policy in 1935 when the Congress enacted and the President approved the National Labor Relations Act.¹ Yet that Act did not deal directly with the process of collective bargaining at all. It specified certain preliminary conditions deliberately designed to encourage joint dealings between organized labor and management.

The purposes of the Wagner Act were: (1) to protect the right of employees to organize *for* collective bargaining and (2) to facilitate the exercise by employees of their organizational rights *through* collective bargaining. Once workers had organized and management had sat down with their representatives around the conference table, the government had no further function to perform. The parties were "on their own."

It was assumed that any and all issues between management and a union could then be readily reconciled by negotiation, compromise, and agreement. This was an er-

¹ The Wagner Act had a number of antecedents going back to the labor policy agreed to by labor and industry as the basis for industrial relations during World War I. The Clayton Act excluded labor organizations from operation of the anti-trust laws and the Norris-LaGuardia Act virtually precluded the issuance of injunctions against labor organizations by federal courts and outlawed "yellow dog" contracts. Then came the Railway Labor Act and the National Industrial Recovery Act, which imposed by law an obligation upon employers to deal collectively with their employees.

roneous assumption. In some industries, the parties were unable to work out a number of issues of overwhelming importance. As respects these issues, which will be discussed presently, the effect of the Wagner Act was to bring fundamental differences between labor and management to a head. There were times when the impasse almost seemed to belie the validity of the underlying philosophy of collective bargaining, *i.e.*, the interests of labor and management are reconcilable.

When workers organized, with governmental assistance, unions sought to effectuate their standard program, which included a complete control—a monopolistic control—of the jobs in a plant and in an industry. The closed or union shop and a 100 per-cent-membership of employees who work in competing establishments have long been cherished goals of the labor movement in the United States. These objectives are sought as a guarantee to the unions of permanent existence and also as the prerequisite for taking working conditions “out of competition.” Elimination of competition for jobs among workers is exactly what collective bargaining means to union leaders now and has meant from time immemorial. Every failure of management to go along with these fundamentals is interpreted by the unions as a refusal to accept “genuine” collective bargaining and as an effort to undermine the labor movement.

Representatives of management, by and large, have held an altogether different view about the kind of a labor movement that should be developed if the government is to protect organizational rights. Their insistence upon freedom of choice by individual employees as respects union membership, was in the direction of maintaining competition for jobs. And many representatives of management also contended that socially desirable collective bargaining is comprised of a series of isolated negotiations focused upon the varying needs of individual plants or companies. Such a policy emphasizes the need for dealing with the competi-

tive problems of a plant in the determination of the conditions of employment.

Governmental assistance to employees in the formation of unions could not possibly result in good collective-bargaining relations as long as such wide differences existed over the proper objectives of the labor movement and about the very function of collective bargaining. The national labor policy enunciated by the Wagner Act proved to be a failure primarily because of the persistence of basic differences between labor and management as respects fundamental principles of industrial relations. In altogether too many instances, the conflict was not resolved around the conference table. It could not finally be settled by the exercise of economic force. An appeal to the legislature from the arbitrament of strike or lockout was a virtual certainty because fundamental principles were at stake.

The Wagner Act was vigorously denounced by management as discriminatory, principally because, during its term, organized labor gained sufficient strength to achieve its age-old objectives more extensively than ever before.² Management then contended, in effect, that since the government had aided in the organization of labor unions, it could not avoid a further obligation to restrict the use to which the unions directed their power. Insistent demands arose from management ranks for legislative curbs upon the growing "monopolistic powers" of unions.

In the interest of clear thinking, one should frankly recognize that the strenuous argument over the Wagner Act which came to a head in 1947 concerned not solely the propriety of the organizational assistance given to employees by the government but more fundamentally the programs followed by unions after their certification. In approving the right of employees to organize, and in accepting collective

² This resulted not solely, or even primarily, from the protection afforded unions under the Wagner Act. Economic conditions were favorable to the growth of unions and for the improvement of working standards.

bargaining, the general public was doubtless far from cognizant of all the implications. These can best be understood by reviewing the course of industrial relations under the Wagner Act. This is one of the main purposes of the present chapter.

Although the Wagner Act was overhauled and supplemented in 1947 when the Taft-Hartley Act became law, the earlier legislation has a deep and a continuing significance. It exemplifies a limited form of government regulation stopping short of the actual conduct of collective bargaining. Unions and management retained the right under this policy to develop every aspect of their relationship in their own way while economic power remained the ultimate determinant of all issues arising between them.

Only one exception to the above-mentioned principles was introduced by the Wagner Act. Settlement of the issue of whether employees could form unions and have them recognized by employers was no longer dependent upon economic power. These rights of employees did not have to be won; they were guaranteed by government. There was no guarantee, however, of union security or of so-called industry-wide bargaining, which most labor organizations looked upon as essential to attaining their objectives. Questions relating to organization and many other matters still had to be handled through collective bargaining. The most significant fact about the Wagner Act, therefore, was the restricted area in which the government intervened.

Rules governing the formation of unions constitute a limited kind of regulation readily distinguishable from various other forms of government intervention. Setting up certain "rules of the game" in the organization of employees might even be conceived as designating conditions precedent to the retention in private hands of the actual determination of conditions of employment.

The one-sidedness of the rules provided in the Wagner Act to encourage unionism was finally recognized as a valid

argument for a change in them. But the one-sidedness was, in itself, no reason at all for changing the policy of government intervention limited to the precollective-bargaining stages of industrial relations. That policy may appear more inviting in future years, especially if it is fully understood that appropriate "rules of the game" can be made applicable to unions as well as to management.

The old Wagner Act has current interest for still another reason. Specification of rules to govern the organization of employees has become a more or less permanent government function. Even though they may be revised from time to time, organizational rules will probably be prescribed by the government for a long time to come. Widespread demands for a relinquishment by government of this particular function are not likely, even though its most important original purpose—elimination of employer interference—is substantially achieved.

Labor and management have each become accustomed to look to government for organizational regulations and to seek those that are favorable to its own interests. These parties realize from first hand experience the importance of political power in any area of industrial relations into which the government intervenes. In consequence, we now know that arguments for changes in the law of union organization to preserve an "equality of bargaining power" are never-ending. They arise between labor and management but government is "in the middle." Policies underlying the Wagner Act need careful analysis presently in order to isolate the distinctive problems that accompany government supervision of employee organizational efforts. At least this much government intervention seems here to stay.

Under the Taft-Hartley Act, the government has assumed greater responsibilities than ever before to regulate industrial relations. This extension of control has a significance that can best be appreciated by a comparison with the policy enunciated in the Wagner Act.

The time will come again for making a choice between more or less government regulation of industrial relations. A prime example of lesser regulation is to be found in the policy enunciated in the Wagner Act. No informed judgment about the advantages and the disadvantages of that policy can be made without a full recognition of the extent to which its effectuation was forestalled by deep differences between labor and management over the very purposes of collective bargaining. These differences are inextricably a part of the history of organizing for collective bargaining under the Wagner Act.

GOVERNMENT PROTECTION OF EMPLOYEE ORGANIZATION RIGHTS

The particular policy expressed by the Wagner Act is understandable only in terms of the industrial-relations problems that prompted passage of this legislation. When collective bargaining was designated by the government as an "approved" institution, joint dealings between "outside" unions and management were the exception and not the rule. Well-established unions existed in many crafts but their strength was concentrated in the larger metropolitan areas. In only a handful of industries were employees organized to any substantial degree. By and large, employees did not hold union membership when the Wagner Act was passed.

On the basis of a rather limited experience, practically none of it in the basic mass-production industries, Congress concluded that an extension of collective bargaining was not only essential for the well-being of employees but in the public interest as well. These were far-reaching conclusions. They could not possibly be tested adequately until more unions were formed. That was the first step in getting collective bargaining under way. Congress accordingly directed its attention to ways by which the government could assist the growth of employee organizations.

A momentous decision was made when the Wagner Act

became law. As a matter of public policy, the economic power of employees was to be deliberately strengthened, particularly to enable them to take better care of themselves in their dealings with employers but in other ways as well. Employee organizations, it was expected, would use their increased strength largely in collective bargaining, rather than for political purposes for example, and no more than an "equality of bargaining power" with employers was visualized for them. Problems of depression were the paramount issues. Accordingly, there seemed to be no possibility that any union would ever secure such great economic power as to enable it to impose unilaterally the terms of employment upon management.

Government intervention into industrial relations for the purpose of increasing the economic power of employees had widespread public support. The policy was one of the most important parts of the New Deal program. Something had to be done about the long hours and the low wages that prevailed in many industries, as an insurance for continuance of the private enterprise system. Most industrial workers in the United States had always looked to unions and to collective bargaining as their main hope for attaining job security and economic advancement. They were to be afforded an opportunity to utilize these instruments of self-help. And it seemed to be a wholly unjustifiable interference when employers prevented workmen from organizing to improve their lot. These aspects of labor's case gave rise to a strong popular support for the Wagner Act.

The record showed that the small extent of union membership in 1935 was not due to any lack of previous organizational efforts by employees. On the contrary, many employees made unusually heavy sacrifices over the years in continuous attempts to gain collective-bargaining rights against a sustained employer opposition. Workers engaged in one organization strike after another and most of them were bitterly fought. Disputes over the right to unionize

characterized the industrial scene for more than a century. "Union recognition" had become the foremost issue of industrial relations. Prior to passage of the Wagner Act, recognition could generally be won only through strike action.

A typical result of most organization strikes was a defeat of the employees. In those cases where victory was won by unions, no more than a temporary recognition could be counted on. Unions recognized by employers on a business upswing, to avoid interruptions to profitable production, were usually swept away when business became bad and jobs became scarce.

Employers were thus able, in most instances, to erect insurmountable obstacles to the establishment both of permanent unions and of stable collective-bargaining relationships. If the issue of union recognition was to be decided solely on the basis of relative economic power there would be plenty of industrial warfare but no stable labor relations. This was very apparent by 1935. It was decided that the formation of unions should not be solely dependent upon the possession by employees of sufficient economic power to force employer recognition.

One should not conclude that employers opposed all kinds of employee organizations with equal vigor. It was the "outside union" that was adamantly opposed. Management frequently raised no objections if the workers of a single plant organized and selected bargaining representatives from within their own ranks. The independent or company union was sometimes encouraged and even initiated by management, especially if that seemed necessary as an antidote to outside organizing threats.

Employers argued that "genuine" collective bargaining could be instituted only by the management and the workers of a particular plant sitting down together and working out those mutual problems that concerned them most directly and with which only they were familiar. "What can

an outside business agent know of our problems and needs?" This was the rhetorical question posed in support of management's position. The issue was not so much over the right of employees to organize as about the kind of a union they should have and the kind of bargaining that was desirable.

Company unionism, or independent unionism, was the antithesis of what the labor movement was after. To begin with, it was reasoned that employees of a company couldn't bargain effectively if they had to protect their own jobs first. Workers had to be represented by bargaining specialists not dependent upon the company for their livelihood if they were to be properly represented. The objective of the labor movement, moreover, was to build an organization capable of establishing "fair and equitable" standards for employees in all competing concerns even though, for some companies, tough competitive problems and profitless operations were the consequences.

It was inevitable that a program of government assistance to employee organizational efforts would become enmeshed in a tangle of arguments about what kind of labor unions and what form of collective bargaining should be encouraged or discouraged as a matter of sound public policy. That is exactly what happened under the Wagner Act. That Act didn't settle the organization issue. The battle over the aims of the labor movement continued as before. Only now the unions had a greater power to gain their objectives. As long as this struggle persisted, unions were convinced that their existence was threatened and that survival questions were of paramount importance.

The use of their economic power by employers first, to deny workmen the right to organize "outside unions," and then, to withhold union security from certified unions, along with the determined attempts of employees to gain these ends anyway, have given industrial relations in the United States their most salient features. No one can be fully

aware of the underlying currents of present-day labor problems without taking into account the intense conflicts over employee-organization questions which have long dominated, and which continue to dominate, the history of the American labor movement. The right of employees to join outside unions and the obligation of employers to recognize and to deal with these representatives have only recently become accepted parts of the industrial-relations code. But the century-long conflict over these principles has left its indelible mark. Unions are still not at all sure of their status as accepted institutions in the economic community. Their programs, moreover, are under almost constant attack because there is no meeting of minds about the proper objectives of the labor movement.

The sense of insecurity felt by unions arises primarily from an implacable employer opposition, in some quarters, to the union objective of "taking working conditions out of competition." The opposition centers in large measure upon the effort of the labor movement to attain union security or that complete organization of employees that will tend to make their objectives achievable. To labor leaders, such employer opposition is nothing more than a refusal to recognize the legitimate purposes of unions. The employer opposition often stems from a deep conviction that the fundamental objectives of the labor movement must be resisted in order to preserve the private enterprise system. There is plenty of room for doubt, therefore, as to whether or not labor and management are generally in accord as respects the preliminary steps which must be taken to develop constructive collective bargaining. What should workers be encouraged to organize for? What kind of collective bargaining should be encouraged as a matter of sound social policy? These perplexing questions arose when the Wagner Act was passed.

Because the conflicts over the objectives of unions and the functions of collective bargaining were so intense, the

government interjected itself into the most controversial of all industrial-relations problems when it undertook to assist employee organization. Let it be understood, however, that the government didn't directly rule upon the issues mentioned.³ Nor did it try to resolve all organization questions. Organizing a union involves much more than signing up members. Winning an election and securing labor board certification are just the beginning.

The government undertook a responsibility only for helping labor organizations to get started. For completing its organization, a union was dependent upon its own devices and collective bargaining. Negotiating skill, attitudes of the negotiators, and economic power all combined to give strength or weakness to a certified union. Initial joint dealings between a management and a newly certified union often had far more to do with organizational questions than with the economics of wages and the setting up of standard working conditions. Union security was made the primary issue in collective bargaining. A great deal of what might be termed organizational collective bargaining was inaugurated under the Wagner Act.

Formation of a paper organization was invariably followed by "demands" upon the employer for so-called union-security clauses. Only a permanent organization can carry out the collective-bargaining responsibilities that unions believe they should assume, and so union security was the number one demand. Substantial wage "concessions" from the employer were sometimes demanded in the first contract solely for union-security reasons. They were occasionally insisted upon even from an employer who lacked "ability to pay."

A demonstration of the capacity of the union to deliver substantial benefits to the employees, as a step in consoli-

³ It did lend assistance to the unions and thereby helped them attain their objectives that were under management challenge.

dating union organization, tended to receive precedence over all other considerations. Provisions also had to be made for stabilizing various job-assignment rules and the handling of grievances in the plant. Then the union looked about to see whether or not there were unorganized workers in other plants who might provide competition by undercutting the gains made and the standards established. If so, these employees would have to be brought into the union. Complete organization of all workers in competing plants would give the unions a power to confront all employers with a demand for uniform conditions of employment. It is this end result to which management has objected most strenuously. Since the first step toward this end is union security in the plant, a great battle ensued over this union demand.

Intervention of the government to create an "equality of bargaining power" will inevitably be challenged on the basis of whether the labor unions are able to gain those objectives that are most strongly contested by management. If unions succeed in stabilizing wages or in introducing a standard policy throughout an entire industry or an entire area, and especially if the wage level is high, management will claim that the government has acted to create labor monopoly and has thereby made genuine collective bargaining impossible. If the unions are only able to develop collective bargaining on an individual plant or company basis, their representatives will insist that labor organizations are not the possessors of equal bargaining power despite all the organizational help given by the government.

"Equality of bargaining power" is bound to be a rather meaningless concept as long as labor and management hold contrary philosophies of collective bargaining. Under such circumstances, government intervention is bound to be complex and controversial even when strictly limited to union-organization questions. What employees are to organize for becomes the crux of the argument. That ques-

tion is not answered by saying that they are to organize for collective bargaining as long as that term is variously defined.

Many of the issues centering around the question of labor movement objectives, which became critical in the administration of the Wagner Act, might well have been minimized or even avoided had the government intervention been confined strictly to eliminating employer interferences with union organization. The Wagner Act went further. Collective bargaining was appraised by Congress not merely as a form of dealing to which employees could aspire without employer interference. It was also approved as a practice that was good for the country. A program of government-enforced collective bargaining was thus inaugurated. The exact nature of the government policy in this regard is an important part of the story of the Wagner Act.

GOVERNMENT-ENFORCED COLLECTIVE BARGAINING

Congress expressly stated its reasons for intervening in industrial relations in 1935. It found that "denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . ." ⁴ Reference to strikes was primarily to work-stoppages for the purpose of forcing union recognition. The organizational strike had long been a standard union practice.

In the above-mentioned finding of Congress, a concern appears to have been expressed about employee dissatisfactions over working conditions for which no adequate redress was available in the absence of collective bargaining. Spontaneous strikes of unorganized workers over the terms of their employment were not unknown. They were such unequal battles that they were, in many instances, close to acts

⁴ In Section 1 of the National Labor Relations Act.

of desperation. To be sure, dissatisfied employees were under no legal compulsion to work at unsatisfactory terms. But economic compulsions to do so were exacting. Quitting entailed the risk of an extended lay-off before a new job could be gotten and a strong likelihood that the new job would be no better, or might be even worse, than the old. So employees stuck it out. They held their jobs tenaciously while trying to form unions surreptitiously. Pent-up grievances accumulated and contributed to the "other forms of industrial strife or unrest" that Congress referred to.

Fundamental weaknesses in our social structure were developing as a result of the continuing struggle over whether or not employees were entitled to "unions of their own choosing." Government intervention was not restricted, therefore, to outlawing those unfair practices of employers that were found to "interfere with, restrain or coerce employees in their efforts to organize." The entire system of individual bargaining between unorganized workers and management was placed on trial. It was found wanting.

Congress concluded that "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership . . . tends to aggravate recurrent business depressions, by depressing wage-rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage-rates within and between industries."⁵ A national labor policy was formulated upon these conclusions. Collective bargaining was selected as the panacea.

Government assumed a responsibility for "encouraging the practice and procedure of collective bargaining" and for

⁵In this paragraph, from Section 1 of the National Labor Relations Act, it seems to be reasoned that organizational assistance to employees is necessary as a balance to the special rights of association previously accorded by government to industry as a means of aiding the growth of business enterprise. There are too many dissimilarities to say that the Wagner Act is the labor counterpart of the Acts of Incorporation but there are similarities.

“protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” Collective bargaining was to be introduced by government as a matter of sound social policy. Workers were to be aided in gaining a power to confront the employer with demands that would otherwise be dormant.

There can be little doubt about the kind of bargaining that Congress expected unions to strive for. Individual bargaining was specifically found to be inadequate and inequitable. It could neither maintain the purchasing power of wage earners nor bring about a stabilization of competitive wage-rates “within and between industries.” Neither could those stabilization objectives referred to in the Act be effectively pursued in many industries by insecure unions or by collective bargaining on an individual company basis. The Wagner Act seemed clearly to recognize the aim of workers to organize unions capable of establishing stabilized working standards between competing companies. But that recognition was given at a time when problems incident to a business depression were uppermost. The downward wage spiral was the center of interest, so the idea of wage stabilization was a “natural.”

Organizing unions to engage in the kind of collective bargaining contemplated by the Wagner Act was a long-run proposition. The requisite degree of union strength was not assured by the Act. It could only come from varied organizational efforts far beyond those supervised by the government. Formation of unions with 100 per-cent plant membership and of industry-wide unions, as well as centralization of authority in national unions, were parts of the follow-up organizational steps planned by the unions. These particular efforts had to be undertaken without government assistance. Union organization had to be completed through agreements with the employers. Out of this

situation came the arm's length dealing that characterized much of the joint relationship that came about solely in consequence of government-enforced collective bargaining.

Employers who had long fought the unions were suddenly called upon to acquiesce in contract terms and to go along with particular procedures all for the purpose of supporting union objectives of complete job control and of standardized working conditions. Management went along in some cases. Collective bargaining then generally resulted in no work-stoppages and salutary results often obtained. Under contrary circumstances, a stable industrial relationship was as far off as ever. Union security took the spot at the center of the stage that had so long been held by union recognition. Since the Wagner Act precipitated the union-security issue, some reference to the inherent nature of this issue might well be made at this point. It need not have become a critical issue and could conceivably have been worked out around the conference table.

The union-security question, which became the crucial organizational issue after passage of the Wagner Act, might have been better and more precisely designated as the "employee responsibility" issue. In exercising their organizational rights, employees not only gave standing to a union but they also made the employer legally responsible for dealing with that union. Employees were given a potent power by the Wagner Act to clothe unions with status and to strip employers of certain previously held rights. Organizational rights of the employees were given careful attention by the government. Their concomitant obligations to the union, to the employer, and to the system they brought into being were dealt with by law not at all. These questions were left to collective bargaining.

Once it is recognized that employees do have obligations commensurate with their rights, the union-security issue can generally be worked out around the conference table. At the very minimum, union members have a responsibility

to support the union as their bargaining representative throughout the life of an agreement made on their behalf. Otherwise collective bargaining would not be an orderly process. The union makes commitments to the employer on the reasonable assumption that it will be the agent of its members at least for the term of an agreement. In recognition of this particular kind of responsibility by employees to the union they create, the maintenance-of-membership formula was devised.⁶

Most unions contend that employees have a far greater duty to support the union as a permanent institution. They have long sought "stronger" security clauses in the form of closed shops and union shops to insure that broad responsibilities will be assumed by employees. Under the Wagner Act, all phases of the problem of union security were assigned for solution to the bargaining table where labor and management possess wide latitude in working out a mutually acceptable solution.

Management has not always been willing to recognize that the organizational question called union security comes within the scope of collective bargaining. Therefore, prior to passage of the Taft-Hartley Act, the issue gave rise to heated discussions around the conference table and often resulted in picket lines. This situation arose when employers were called upon to specify some of the obligations which devolved upon *all* their employees because a majority of them had voted for a union. Union security clauses consolidate organizational strength by making the jobs of employees dependent upon continued good standing in the union. The employer was expected to agree that a "strong" union is essential to collective bargaining. He was further asked to assume an obligation to discharge efficient and valu-

⁶ Under the maintenance clause, employees who are members of a union on a key date, or those who join the union during the term of an agreement, are obliged to maintain their union membership for the life of the labor contract.

able employees if their "good standing" with the union became impaired.

The demand for union security often came as a heavy shock to employers who were not "sold" on outside unions to begin with and who entered upon joint dealings on a "shot-gun wedding" basis. Management insisted it would have no part in forcing workers into a union, especially those employees who stood "loyally" by the company in opposition to union organization efforts. The union security issue became the most critical issue in industrial relations following passage of the Wagner Act. It was organizational in nature and was related to fundamental job-control objectives of the labor movement. But the manner in which management was to operate the plant was also involved.

Other questions relating to organization were thrown into collective bargaining. Most unions want to deal with representatives of a group of employers rather than separately with the management of each company. Only in relation to the broad objectives of the labor movement can one find an explanation of the encouragement and assistance given by some unions to the organization of individual employers with whom they deal in an employers' bargaining association.

This phenomenon is sometimes explained by noting that it is easier and less troublesome for a union to negotiate one agreement for a group of employers rather than a series of individual agreements. Far more important is the fact that a "master" contract covering competing employers constitutes management's acceptance of the collective-bargaining goal of standard or stabilized conditions of employment. Organizing for collective bargaining from the union standpoint is not complete until all the employees within its jurisdiction are union members under effective security clauses and, in many cases, not until the employers with

which it deals have combined for joint collective bargaining.

One of the principal indictments of the Wagner Act was that instead of leading to industrial peace as intended, it generated far greater strife than ever before experienced. In that indictment, cause and effect are commonly not precisely differentiated. Collective bargaining failed to result in amicable settlements of some crucial issues. A great part of the labor strife during the past decade stemmed from an inability or an unwillingness of labor and management to reconcile their differences over organizational questions not directly dealt with in any way by the Wagner Act. These differences were mainly over union security and joint-employer bargaining.

Organizational issues thus continued as a bar to stable industrial relations long after a majority of the employees joined a union and long after initial collective-bargaining agreements were signed. The failure of collective bargaining to resolve the organizational issues mentioned above resulted, in the postwar years, in an insistent demand for their settlement by legislation.

Viewed in its entirety, the national labor policy embodied in the Wagner Act was to provide employees with government assistance in order that they might better mobilize their economic strength. Preventing employers from interfering with this mobilization was one phase of the program. Other assistance was given. Elections were held under government auspices to assist employees in expressing their desires. The National Labor Relations Board, wherever necessary, determined proper employee units of representation. Unions were certified by the government as the authorized representatives of employees, and management was compelled to deal with the certified unions. From that point on, all industrial-relations problems were to be worked out by unions and management, free of government regulation or control.

Because of deep-seated differences between unions and

management as well as between major sections of organized labor over the fundamental purposes of collective bargaining, the anticipated era of industrial peace seemed to be no more than a mirage in some industries and in many plants. Throughout the entire decade following passage of the Wagner Act, organizational questions not dealt with by that Act absorbed so much attention that labor and management were, by and large, unable to concentrate their efforts upon building up collective bargaining as a process for stabilizing industrial relations.

THE PRINCIPLE OF SELF-DETERMINATION

To advance the cause of collective bargaining, the framers of the Wagner Act made it mandatory for management to sit down with the representatives of the workers to discuss mutual problems with a view to arriving at a meeting of minds.⁷ Any problem not peaceably resolved could be subjected to arbitrament through strike or lockout. Collective bargaining operates in that way. For the system to work satisfactorily, however, possession of the rights to strike and lockout must be primarily for the purpose of encouraging agreement. Actual work-stoppages have to be reserved as last resort measures. There can be no questioning the fact that, after passage of the Wagner Act, practice did not substantiate this theory in far too many cases.

An important reason for frequent resort to economic force, as noted previously, was the fundamental difference between unions and management about the very purposes of collective negotiation. Just as the unions found support for their

⁷ This obligation was specified in Section 8 (5) of the Unfair Labor Practices Act. A duty was imposed upon employers to bargain "in good faith," but no corresponding obligation was put upon unions. In a sense, Section 8 (5) was incongruous with the rest of the Act. It interjected the government into the procedures of collective bargaining. Administration of that clause might easily have resulted in extensive procedural rules for the conduct of negotiations, whereas these matters remain with the parties under free collective bargaining. On the other hand, organizational questions often predominate in initial negotiations. For this reason the clause was apparently made a part of the Wagner Act.

contentions in the very words of the Wagner Act,⁸ so did the employers.

Management emphasized that the Act was limited to a protection of the employees' rights to organize. It gave no direct support to the right of job monopoly claimed by the unions. On the contrary, employees were to be given a full opportunity to decide for themselves whether or not they wanted a particular union to represent them. Employees were guaranteed "full freedom of association" and the right of "self organization." Those words were interpreted by some managements as giving every individual employee a free right to decide at any time whether or not he wanted to be a union member. A union would have the right to represent the workers, moreover, only if a majority of them wanted it that way. Since determination by majority rule of the employees in each plant, or smaller groups, was decisive, according to management view, it was reasoned that industry-wide bargaining was rejected in favor of employee self-determination.

The Wagner Act unquestionably sought to buttress the right of employees to make their own decisions about union representation. But one formidable and crucial decision must be made whenever the representation issue is resolved in conformance with the self-determination principle. Among what group of workers is a majority vote compelling? In other words, what is the appropriate unit of representation? The representation desires of the employees in a particular plant or area may clash head-on with the job-control objectives of the "dominant" union supported by a majority of the employees in an industry.

Superimposed upon this unit question is the still unresolved conflict between craft and industrial unions. Craft unions seek to stabilize or standardize conditions of employment for all the workers of a particular craft irrespective of the companies or industries in which they are employed.

⁸ See page 48.

The craft-union program is usually for local application because the labor market is the area of competition to be regulated. Industrial unions are committed to bargain for all the employees of a plant and of an industry irrespective of the location of the plants or of the work performed by the employees.

Conflicts between unions over the proper form of collective bargaining have at times been every bit as intense as differences between organized labor and management on the same subject. A great power to influence the course of these various conflicts was given the National Labor Relations Board when its duties were defined as including a determination of the appropriate bargaining unit.⁹

In spite of the vigor with which claims about the relative merits of craft and industrial unions are pressed, the labor movement in either case strives for a complete organization of employees to eliminate worker competition for jobs. Self-determination by employees may be at sharp variance with this fundamental union objective. The two approaches might conceivably have been brought into harmony under the Wagner Act if "appropriate bargaining units" could have been set up to encompass all employees of competing employers either on a craft- or industry-wide basis. Then, all the workers in the basic steel industry, for example, would have decided by majority vote whether or not the same union would represent them.

Such a policy was neither feasible nor practicable. Most employees were not union members in 1935. Their organization could only proceed gradually if they were to be organized at all. The formation of unions was necessarily on a plant-by-plant basis, and union certification was se-

⁹Section 9(b) of the Wagner Act provided: "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

cured for plants as they became organized. In only a relatively few instances did unions claim the right to multi-employer bargaining units, and, of course, the employers didn't suggest them.

Application of the self-determination principle on a plant or company basis proved to be a distinct help in the organization of employees. It naturally received widespread union support because winning local elections was an effective way to extend organization. Widespread dependence by unions upon this device, however, marks no change in the fundamental union objective of complete organization and control of jobs, irrespective of the desires of individual employees in a plant or even despite the contrary wishes of a majority of the employees in a particular plant.

It should not be overlooked, in this connection, that the Wagner Act established certification procedures, based upon the self-determination of employees, for the voluntary use of employees. They were not exclusive procedures. Choice of other organizational practices by unions was not precluded. Any union could elect to carry on an organization strike to force recognition from the employer even though a majority of the employees might be opposed. The right to do so was guaranteed by that provision of the Act reading: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."¹⁰

Organization strikes, then, were not outlawed by the Wagner Act. And so-called "organizing from the top" was not made illegal. Employers and unions could still agree upon union membership as a condition of employment without a full recognition of the right of employees to choose this bargaining representative. The Wagner Act provided that nothing "shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein if such labor organ-

¹⁰ Section 13.

ization is the representative of the employees . . . in the appropriate collective-bargaining unit covered by such agreement when made." An employer could be induced through negotiations, or by a strike, to grant a job monopoly to the union. Whether or not that was in accordance with a majority choice of the employees would not, in practice, be tested unless a rival union challenged the action. Many a closed shop contract signed when a company had only a handful of workers was vigorously defended and enforced by the signatory union even after there could be no doubt that, because of plant expansion or labor turnover, most of the employees no longer wanted the contracting union to be their representative. "Organizing from the top" was still an available method for building up a union.

In going along with the self-determination procedure of employee elections under the Wagner Act, unions did not concede the right of workers in particular plants to remain nonunion. Or, as their representatives might put it, unions did not concede the right of employees to engage in unfair competition for jobs by working below union-stabilized conditions of employment.

After passage of the Wagner Act, employer opposition to the objectives of the labor movement centered more and more about a defense of the self-determination rights of employees. In attacking the closed-shop principle, management contended that the right of an individual workman to stay out of a union is every bit as fundamental as his right to join. Opposition to industry-wide bargaining was related to the proposition that a majority of the employees in each plant, or in each company, have a right to determine for themselves what their conditions of negotiations and employment should be.

Serious proposals were made by industry representatives to outlaw the closed shop and to make union recognition exclusively dependent upon the winning of a representation election among the employees of a plant or a company. In

other words, organization strikes should be outlawed and the self-determination principle solidified. The labor-movement objective of complete job control was thus combated by a vigorous defense of the right of individual employees to make their own choice about union affiliation.

Joint dealings on an individual plant or company basis were extensively instituted as the labor movement expanded. This resulted not alone from the Wagner Act but also from the impetus to organization which came from active business and increasing costs of living. Employees and not jobs were scarce in most of the years from 1937 to 1947. Unions were faced with no immediate urgency about instituting industry-wide standards as a protection against deflationary movements. As a matter of fact, labor standards were probably improved most during the war years in industries where wages had not previously been stabilized.

Beyond the immediate affairs of the day, unions looked to the future when the tables might be turned. The drive for complete unionization never ceased. So rapid was the growth of unions, however, that "worker education" in the broader objectives of the labor movement was, at best, incomplete. A large percentage of new union members were aware of no obligation on their part to participate in the affairs of their organization. Many questions have accordingly been raised about whether or not the long-range objectives of labor unionism are actually supported by the great majority of union members. Voting for a union was primarily to secure the immediate gains which went with collective bargaining. Whether the vote also evidenced a willingness to submit to "union discipline" and actively to participate in programs for complete industry-wide unionization are questions the answers to which are not entirely clear.

Just what did employees vote for when they selected outside unions as their bargaining representatives? They certainly wanted, at least, joint dealings on a plant basis. That

was a proven method of securing more money and often of insuring "easier" discipline in the plant. During the war, employees realized their need for a union to represent them "before the War Labor Board." These were strong reasons to "vote union." At the same time, employees could not have been unaware that closed shops and union shops would be among the first demands a union would make of employers. They certainly acquiesced in and, by and large, approved the idea of union security.

But, they certainly did not "buy" any mere arbitrary transfer of power over their jobs from management to union officials. When such a transfer followed employee organization, as it did in a minority of the cases, demands came from the union members themselves for legislative protection against the very organization they had created.

No form of "undemocratic" job control by union officials is reconcilable with "legitimate" labor-union objectives. This proposition is fully accepted by most labor leaders who readily admit the urgent need for eliminating every instance of it—but by the labor movement itself and without any outside direction or supervision. They insist that correction of the abuse by outlawing the closed shop, for example, is not a way out. From their point-of-view, that tears away the very foundation of the labor movement.

Again and again, the critical problems in industrial relations during the past ten years have centered about an unrelenting defense by the labor movement of the union's right to control all jobs and the opposition of management, the public, and of some workers to this program. One of the difficulties in resolving these differences lies in a failure to appreciate how deep-seated is the issue. Dogged adherence by union leaders to long-established objectives can easily be mistaken for a grasping for power for its own sake.

Collective bargaining is built upon the premise that the interests of labor and management can be reconciled by understanding, compromise, and voluntary agreement of

these parties. Proponents of collective bargaining reject the notion that the opposing interests and objectives of labor and management are irreconcilable. They also refuse to accept the proposition that class warfare is inevitable. Experience of the past decade under the Wagner Act reveals a deep and a wide gap that has to be bridged before collective bargaining can be developed as a constructive institution.

Organizing for collective bargaining will continue to be a subject of major discord wherever labor and management disagree about the kind of joint dealings for which employee organization is undertaken. Nor can the issue be finally resolved by legislation promulgated to circumvent unions from seeking complete job control in each plant and in each bargaining area. Passing legislation on this vital matter only transfers the question from the economic to the political arena.

Considerable attention has already been focused upon the fundamental conflicts between organized labor and management over the proper or legitimate objectives of the labor movement. Since an understanding and a resolution of these differences is without doubt among the most important tasks in the field of industrial relations, some of the underlying causes of the present differences should be discussed. They have to be understood and taken into account if the biggest gap between labor and management is to be bridged.

BASIC CONFLICTS OVER UNION OBJECTIVES

More than anything else, our experiences under the Wagner Act show a need for straight thinking about the nature of the impasse which continues as a road block to progress. It is the fundamental objectives of the labor movement which are involved. What about these union demands for monopolistic control of jobs and for taking working conditions out of competition? Are they reasonable or unreason-

able? Does acceptance of them actually weaken the private enterprise system? Can they be worked out through peaceful negotiations? These underlying questions were precipitated when the Wagner Act made it possible for labor organizations to raise problems of greatest importance to employees.

No one who understands why men form unions will doubt the "grass-roots" source of the objectives which have been set by labor unions. Programs have been formulated to meet the demands of a majority of employees for adequate protection. They have been developed more for the "bad times" than for the "good times."¹¹ That they often seem less urgent to some employees when jobs are plentiful, only accentuates the effort of union leaders to adhere to them at all times.

The entire point of employee organization is missed by that employer who says: "It's none of my business whether my workmen join or refuse to join a union. I have no more interest in the matter than about their decision to join or not to join the Elks, the Masons, or a particular church." One important difference is that employees join a union primarily to enable them to assert an effective voice in the way that employer's plant is operated. Costs of production and profits are involved in the decisions in which workers want to participate. The whole idea of employee organization is to "interfere" with the right of management officials to run the business in any way they see fit. Unions are actually quite unlike the other organizations mentioned as far as the employer is concerned.

Strenuous efforts by union-minded employees over the years to create strong, permanent organizations cannot be lightly explained away by an indirect reference either to the

¹¹ Over the years, union membership has increased with an upswing of business and has fallen away with the downturn of the business cycle. In times of bad business, unions lacked economic power and employees could gain little protection from their unions. Union programs currently sought are primarily to provide economic power during a business downswing.

“joiner” instinct or to a suspect urge to seek power for power’s sake. A desire to do something about the job insecurities and the wage insecurities which are the lot of most employees most of the time, but especially during a business cycle downswing, is at the root of employee organization.

During a war, or in some periods of inflation, unorganized employees have effective individual bargaining power thrust upon them. But at other times—during “normal” times—there are usually more workmen than jobs to go around. Most employees can’t get along for many days without a job. That may mean working at cut-rates and keeping quiet about working conditions. Competition between individual employees for scarce jobs can quickly deprive them of any effective voice in day-to-day relationships. It can also drive the price of labor down so fast as to shatter working standards to a breaking point as in the period from 1929-33.

Competition between workers to sell their labor has been placed in an altogether different category from competition in the sale of goods. The differentiation was made when, in the course of human events, the idea prevailed that “labor is not a commodity.” In terms of this principle, the objectives of the labor movement can best be understood. Criteria in addition to competitive factors of supply and demand for labor have to be developed for determining fair and equitable conditions of employment. Unrestricted competition between unorganized workmen in the sale of their labor is inappropriate even in a competitive economy and under a private enterprise system. These are the far-reaching principles which go along with the conclusion that labor is not a commodity.

Putting these ideas into practice has meant the subordination of certain rights of individual employees. With the acceptance of collective bargaining as an approved institution, unions do not believe that individual employees should

be accorded a right or the liberty to stay out of the union and thus compete for jobs on their own terms.

Employees organize primarily to restrict competition among themselves in the sale of their labor. This is no new idea. It has been strongly emphasized in most of the systematic interpretations of labor unionism. As early as the 1890's Sidney and Beatrice Webb were impressed¹² with the similarity of the objectives set up by the various trade unions. By a variety of means, unions universally sought to restrain competition among employees so that working standards might be maintained and improved.

The pioneering investigations of the Webbs first made clear the principal functions of unionism. Limitations upon the number of employees available to perform certain work, establishment of common minimum wage rates, and fixing standard conditions were the most important policies. Whether these policies were effectuated by collective bargaining or by legislation, they were followed for one main reason. It was to prevent the economic consequences of unrestrained competition among wage earners.¹³

Acceptance of collective bargaining by an employer means, in these terms, that management is willing to "go along" and cooperate with the union in developing union security and standardized conditions of employment within a plant and between competing plants. Collective bargaining grounded upon these principles has long been carried on in the United States between craft unions and employers usually on a local basis but still covering a complete area of competition. In a relatively few manufacturing indus-

¹² See *History of Trade Unionism* (London: Longmans, Green & Company, 1894) and *Industrial Democracy* (London: Longmans, Green & Company, 1897). These books were based on British experience but have been recognized as relevant in explanation of the basis of labor unionism in the United States.

¹³ One may note, at this point, that monopolistic job control has not been a fundamental objective of the labor movement in England as it has been in the United States. But neither was there a disposition on the part of British employers to oppose, in principle, the union objective of standardized working conditions within a shop and throughout an industry.

tries, the same kind of collective bargaining prevailed long before the passage of the Wagner Act. Results were not always satisfactory. Union restrictions sometimes resulted in an insufficiency of employees to meet demands of the consumer. Undue increases in production costs and prices occasionally priced goods out of the market. "Featherbedding" practices developed in some instances.

Against these real disadvantages, many distressing conditions were eliminated and some notable results were achieved. Stability of labor standards, especially in highly competitive industries like the needle trades, brought enormous benefits to employees and employers alike. Competition based upon paying substandard wages was eliminated. These industries were also able to service the consumer in a more orderly manner than when they did business under "feast or famine" conditions. By 1935, sufficient experience had accumulated in a large enough number of industries to show that union objectives in collective bargaining could be secured either without interfering with proper performance of the management function or without necessarily restricting competition in the sale of goods. Such results could not be guaranteed. Much depended upon the creation of what has come to be called "sound industrial self-government."

In the most highly competitive industries, particularly where labor costs run high, acceptance by employers of the "genuine" collective bargaining proposed by unions has often been willing and sometimes enthusiastic. Management in these industries soon discovered that stabilization of labor cost lessened the disastrous effects of "cut-throat" competition not only for workers in looking for jobs but also for employers in the sale of goods. By having a complete job control, the union could "police" the agreed-upon work standards. The union would see to it that no company gained a preferred market position by paying "substandard

rates" to its employees. Competition in the sale of goods would then depend primarily upon relative managerial efficiency and would be intense but logical. Collective bargaining, as conceived by the labor movement, has been accepted by many segments of American industry. There is still, however, far from a unanimity of opinion.

Transference of the stabilizing formula used by craft unions and industries such as the needle trades to the basic mass-production industries was the big step which had to be taken if the purposes of the Wagner Act were to be carried out. Employers in these industries continued strong in their earlier opposition. This was to be expected. But, the public gradually came to have strong doubts about the likelihood that this program could be carried out with a proper regard for the general welfare. Such doubts came not so much from a loss of faith in the principles of collective bargaining but out of the size and the bigness questions which were brought to the fore as employee organization grew.

Widespread use of collective bargaining in the mass-production industries entailed the organization of unions with unparalleled economic power. Hundreds of thousands of employees had to be brought under a centralized union control. The individual employee commonly got lost in the vastness and the complexities of union politics and organization. Industry-wide collective bargaining in the mass-production industries also brought the threat of strikes that would constitute national emergencies.

Many employers said, in effect, "Collective bargaining, as the labor movement conceives it, might be workable on a local craft basis or even in 'minor' industries, but it can't work out in the big basic industries. Unions with complete job control in such industries would be strong enough to dictate to industry and even to challenge the government." In other words, it is argued that there are limits to the power,

even that coming from job control, which can be concentrated in private hands if our production system and form of government are to survive.

There can be no doubt either about the great power which derives from complete job control or about the insistence of the demands of the labor movement for a right to secure such power. No more vivid statements concerning the job-control objectives of the labor movement exist than those which have been made by Selig Perlman. He begins by analyzing union practices and finds a common attribute of job control based upon the limited employment opportunities available to employees.¹⁴ The urge to secure a collective control over relatively scarce jobs is appraised by him as the principal driving force behind employee organization.

In 1943 Perlman described the American Federation of Labor as "an empire of jobs" and stated that "wherever there are jobs, that is the territory of the legitimate labor movement . . . Whenever a national union is chartered by the American Federation of Labor it becomes . . . a job kingdom."¹⁵ In following through on this reasoning, Perlman states: "I do not believe that deep-down the American labor movement really believes that a vote by the employees of a given plant can make a union legitimate. In other words, I don't believe that at bottom the American Federation of Labor believes in the plebiscitary method of establishing a legitimate union . . . it will tolerate it only when it thinks the results will coincide with another method, namely the method of the exclusive job-empire charter."¹⁶

With the extension of unionism into the mass-production industries, the job-control objectives of the labor movement led to far greater concentrations of union power than had previously been associated with collective bargaining. To

¹⁴ Selig Perlman, *A Theory of the Labor Movement*. (New York: The Macmillan Company, 1928.)

¹⁵ Selig Perlman, *Labor in the New Deal Decade*. (Educational Department, International Ladies' Garment Workers' Union, 1945), p. 16.

¹⁶ *Ibid.*, p. 18.

the leaders of labor, this was no more than a natural development. Big business had to be matched by big unions if equality of bargaining power was to obtain. But big business was already subject to government regulation in the public interest. Big unions would inevitably be faced with the same demand from the public.

The concentration of power in union hands became, in a way, a problem separate and distinct from usual industrial-relations considerations but it was also a factor to take into account when adding up the merits and the demerits of collective bargaining. Public concern about the threats of bigness in unions was aggravated by a growing realization of the purposes other than collective bargaining for which union power could be used. Collective bargaining need not be chosen as the means for attaining the goals of employees.

It will be recalled that, in their theory of the labor movement, the Webbs noted a tendency for unions to restrain competition among employees not only through collective bargaining but also by legislation. Still other objectives and different methods can be chosen. Power has many uses. The diversity of available objectives and methods in the United States was most notably spelled out in 1917 by Robert F. Hoxie.¹⁷ Looking upon labor unions essentially as phenomena of social psychology, Hoxie observed four main types of employee organizations. They were designated by him as trade-conscious business unionism, idealistic-uplift unionism, revolutionary unionism, and predatory unionism. The distinction in policies of union groups first emphasized by Hoxie is of value in appraising the national labor policy embodied in the Wagner Act.

When the government intervenes in industrial relations in order to help workmen to organize, assistance is accorded not only to unions which propose solely to engage in bargaining. Those with supplementary or contrary purposes will

¹⁷ Robert F. Hoxie, *Trade Unionism in the United States*. (New York: D. Appleton & Company, 1917.)

be helped as well. The Wagner Act guaranteed "freedom of association" for employees not simply to enable them to engage in collective bargaining but also for "other mutual aid or protection."¹⁸

The "other" purposes can be numerous. On the record are attempts by unions to set up producers' cooperatives and even more frequent efforts over the years to direct the power of organized workers into the political field. The leaders of some unions hold Communist convictions. Tactics and the "party line" at times bring them to the use of negotiated agreements. But fundamentally they believe that collective bargaining is nothing more than a snare and a delusion which blinds workers to the irreconcilability of their interests with industry's interests.

Demands for a control of the manner in which unions use their power are inevitable whenever the government aids the employees to organize. Among the most controversial questions of recent years has been the propriety of giving government support to the creation of unions which emphasize political objectives or which are Communist-led. Only slightly less controversial has been the question of whether the government should try to prevent rather than facilitate the concentration of tremendous power, monopolistic power, in national unions.

It has been generally assumed in the United States that, when they express a desire to organize, the overwhelming majority of the workmen have a "limited objective" in mind. That is, they want principally collective-bargaining rights. Unions making up the bulk of the labor movement have operated on the assumption that this is the case. They are becoming increasingly aware, however, of formidable obstacles in the way of developing collective bargaining as the all-sufficient means of providing employees with the protection they seek.

A grievous error would be made by anyone who fails to see

¹⁸ Section 1.

that a "limited objective" of the labor movement will continue only as long as substantial economic protection and security accrues to employees through the practice of collective bargaining. Collective bargaining has been placed on trial by management and by the public. But it is also on trial before the employees.

The chances of developing collective bargaining as an institution adequate to deal with the demands of organized employees for fairness and equity need to be carefully evaluated. Employee demands relate both to the day-to-day operations of the plants and to the determination of wage standards. Previous mention of several "theories" of labor unionism may seem to imply that the employee demands are primarily abstract or ideological in nature. This would be an erroneous assumption. In the factories and around the bargaining tables, organizing for collective bargaining means establishing a union strong enough to protect the jobs of particular employees and the working standards which go with them. Some further discussion of the way in which this gives rise to basic conflicts between labor and management is in order.

Conditions of Job Tenure

Individual workers expect their union, above all else, to secure their right to a job along with definitive opportunities for promotion to better jobs. Rules specifying the rights of individual employees to hold particular jobs, largely on a noncompetitive basis, comprise a large part of most labor agreements. A complete control of all the jobs in a plant is sought by a union so that established rules will provide a maximum of job security and job opportunity to its members as a group.

Modification of the employer's absolute right of job assignments is among the most fundamental matters with which a union has to deal. The demand for a closed or union shop is related to the provision of group opportunity,

largely on a noncompetitive basis, instead of provision for individual opportunities based upon competitive performance. Title to a job is often conceived by unions as a sort of "property right" which carries "ownership," as is the case with most property, irrespective of whether or not the asset is most effectively utilized.

This idea comes into sharp conflict with management necessities. There is, of course, a limit to the extent to which the union objective can be recognized if a plant is to keep competitive and if it is to provide full employment. A reconciliation of the demands of labor and the necessities of management is necessary. It has to be effected through the give and take of collective bargaining.

Group attitudes about job rights are often dramatically displayed. The discharge or the layoff of a single employee can become a fighting issue for hundreds or even thousands of employees. In the minds of each is the fear that "if management can make Joe's discharge stick, I might be next." Little regard is given, in many cases, to the merits of management's disciplinary action. This is particularly the case if a steward or a shop-committeeman is given a "yellow-slip" after a union has just been certified. Fear of premeditated "undermining of the union" often looms much larger in the minds of employees than the need of management to maintain proper discipline.

Until the union's status is secure, management is frequently hard put to carry out sound disciplinary policies. Yet a proper discipline program is clearly essential for efficient plant operation. Where workers feel that management had previously abused its "prerogatives," organization is likely to bring a demand for some form of outright control over disciplinary functions by the union. No union can serve all its members and still perform those management functions. The customary goal of the secure union is participation in the formulation of a discipline policy to be administered by management subject to a right of appeal through the grievance procedure.

Nearly as vital as questions of job security to the employees is the handling of day-to-day problems which come under the head of "grievances." Promotion questions fall in this category. Without an organization behind him, an employee frequently has no alternative but to accept management's disposition of any claim made for a change in working conditions. Unless "points of reference" are available for deciding the merits of grievances, either in a labor agreement or in a carefully stated company policy, settlements will seem to be capricious even if they are not so in fact.

There is even more to the grievance problem. On its own initiative, management in unorganized plants has frequently taken extraordinary steps to insure fair and equitable handling of employee complaints. Deep resentment may nevertheless result over the power of management to act, as one employee expressed it, in "the capacity of judge, jury and prosecuting attorney all at the same time." A powerful force behind the demand of employees for organization stems from a desire to "have a say" in those decisions which determine their job status and which dispose of their day-to-day grievances.

A primary union objective, then, is to effectuate standard rules governing job assignments and working conditions. Under such rules, the competitive performance of individual employees is not a compelling determinant of the right to hold a job, to secure a better one, or to gain improved working conditions. Unless union rules apply to every job in the plant and unless every employee can be held responsible by the union for abiding by them, a threat to working standards exists. Insistence upon this point comes not only from a desire of most employees for job certainty, but also from a long history, in some plants, of favoritism and even caprice in the making of job assignments and the handling of grievances under nonunion operations.

In the so-called open-shop plant, every promotion of a nonunion employee, rightly or wrongly, will typically be

looked upon as a discrimination against union members even if the advancement was based upon merit. Work assignments are made, it is often claimed, to give nonunion members the easiest and the best-paying jobs. Another frequent contention is that management tolerantly overlooks the missteps and lapses of nonunion members but "bears down" on union members by applying rigid discipline.

After such experiences, and others of a similar nature, many an employer has reluctantly concluded: "I prefer to have no union at all. If I have to deal with the union, and it looks as though I will, give me a union shop in the interests of efficient plant operation." Completion of a 100 per cent union organization is appraised by many managements as a prerequisite to running the business properly under collective bargaining.¹⁹ Under these circumstances, working out a union security clause which will meet the needs of a particular situation can best be done in collective bargaining and not by law.

Management's power to discipline and promote employees at its own discretion has already been widely modified as a result of the extensive organization of employees. Grievance settlement is now almost universally looked upon as a joint undertaking. These are positive results of the widespread organization which followed passage of the Wagner Act. Employers have accepted these new developments. As a matter of fact, they sometimes have to get busy if they would preserve their own voice in day-to-day operations. Management demands for its own collective-bargaining rights have become quite general.

Unless sound collective bargaining is introduced when management's "prerogative" goes out, the employee's de-

¹⁹ Union leaders often contend that union members also have a fundamental right not to be compelled to work with employees who are anti-union. They point out that nonmembers are in a position to seek preferred treatment from management and to work at cut-rates in an effort to get ahead at the expense of all the employees. It is likely that this "right" to refrain from working with nonunion employees will be extensively invoked under the Taft-Hartley Act which has banned the closed shop.

mand to hold his job or to get a better one, irrespective of performance or deportment, can raise problems as serious as when management had the power to make unchallengeable decisions. Some unions possess sufficient economic power to establish "prerogatives" of their own. They seek to enforce the disposition of grievances on their own terms. Performance by management of its proper disciplinary functions, so essential to efficient plant operation, can then be completely forestalled.

During World War II, and immediately following it, many a shop committee used the threat of plant shut-down, no-strike clauses of agreements notwithstanding, to dispose of grievances on its own terms. Such power could then be readily exercised because men and not jobs were scarce. These practices were characteristic, too, primarily of new and "undisciplined" unions. But, they constituted collective-bargaining failures.

The introduction of a union into a plant was too often accompanied by a serious breakdown of proper discipline and a consequent impairment of efficient operations. One of the basic conflicts over union organization developed. Questions about union responsibility under existing contracts have been among the most important of the current industrial-relations problems. They center about "wildcat" strikes and the breakdown of management's essential discipline policies.

Over the past several years, however, tremendous progress has been made in building up an effective day-by-day collective bargaining capable of handling grievances and job-assignment problems with a proper regard for both union and management necessities. A great deal has also been learned about the use of grievances procedures with so-called terminal points at which arbitration is brought into play.

It can be confidently asserted that, in day-to-day operations, the necessities of management can be effectively reconciled with the objectives of the labor movement when

standard collective-bargaining practices are followed. Organized labor and management face the task of using those practices more extensively. On the basis of this conclusion, one might think that the development of collective bargaining since 1935 has been moving along rather well. That such is not the case is attributable mainly to much less salutary success in handling the other principal objective of unions.

Maintenance and Improvement of Wage Standards

Union security clauses have just been referred to as organizational devices for securing complete job control within the plant. One of the reasons behind the union demand for these clauses, as just pointed out, is a desire to protect the right of employees to particular jobs. Another is the need for making agreed-upon standards uniformly applicable in the settlement of day-to-day grievances. These ends could be achieved by strong local and independent unions. Since employees also expect their union to restrict the employer's latitude in cutting wages or in refusing wage increases, another organizational objective comes into being. Complete union organization of all the jobs in competing plants is introduced as a goal.

Pressures to organize inter-company unions, particularly as a protection for wage standards, varies with the nature and intensity of competition between companies in the sale of goods. Employees in local public utilities, for example, have far less need for an inter-company wage stabilization program than do workers in the men's clothing industry. Wage differentials between companies in these two industries have little or great effect upon job security.

In most communities the purchaser of power can't shop around for lower prices. The buyer of men's clothing can and does. In the men's clothing industry, all the manufacturers compete nationally. Industry-wide organization and a comprehensive wage stabilization program are sought by

the union, therefore, to protect the employees' interests. Demands for inter-company organization of employees also tend to be strongest when labor costs constitute a high percentage of total costs and hence have a great deal to do in determining the ability of a company to sell in competition and to provide steady jobs. As a general proposition, too, the elimination of wage competition is far more necessary for employees in periods of business depression than in times of business prosperity.

The objectives of the labor movement may be "limited" to collective bargaining. The limited objective nevertheless includes a complete control of competing jobs. If industry-wide bargaining is defined as the effectuation of a stabilized wage policy for all companies which compete directly in selling to the consumer then the limited objective also encompasses industry-wide bargaining. One of the most prevalent misconceptions about industrial relations is that all employers are opposed to the union control of jobs and to industry-wide bargaining as just defined. Most employers demand in collective bargaining that the union either stabilize or equalize wage rates. What "the other company" pays or concedes is a matter of vital concern.

The need for inter-company organization of employees and for stability of wages was most strongly highlighted during the 1929 depression. Local bargaining over wage rates between different unions and certain selected plants in an industry, or even between one union and a group of employers representing only a part of an industry, was found to be wholly ineffective in protecting work standards. High-rate union plants were idle while lower-rate nonunion plants continued to operate. Union plants with relatively low rates got the business while other union plants with higher standards did not. Employers reluctantly demanded wage reductions because their competitors had already put in a wage-cut. They said in negotiations: "We don't want to reduce wages but will have to do so to operate unless you

organize our competitors and bring their rates up to ours. Take your choice."

Out of bitter experience, employees learned that wage reductions taken in union plants to keep in line with competition only fed a downward spiral. Rate disparities continued as before but at a lower level. It cannot be inferred, of course, that ill effects of the 1929 depression were avoided wherever unions had previously organized all employees. Such unions were able, however, to maintain stabilized work standards despite a scarcity of jobs. Work-sharing at the stabilized conditions was the practice.

Economists often contend, and logically so, that keeping standards at an unduly high level in well-organized industries restricts the total opportunity for employment and constitutes, therefore, a hindrance to breaking the back of any depression. In such discussions, the level of wage stabilization should be sharply differentiated from the question of whether any stabilization is desirable. The two aspects of the problem call for separate treatment. Of the need for a stabilization program in many industries there can be little doubt. Nor can there be any question that the level of stabilization has to be set with an eye upon maximizing job opportunities.

It is not possible to justify the unrestrained and disorderly deflation of labor standards which occurred so widely in the early 1930's if one holds the view that "labor is not a commodity." Many a manufacturer freely admitted in those dark days that he actually had very little control over the wages he paid after all. He recognized that industry-wide factors, as well as the state of the national economy, were of overwhelming importance in wage determination. Some of those manufacturers encouraged and even initiated multi-employer collective bargaining as the only way of bringing a measure of stability into the picture.

Labor organizations which had been built up against tremendous odds were either eliminated or rendered powerless

during the 1929 depression. Now that they are back on their feet again, stronger than ever, they look to industry-wide control of jobs as a necessary precaution against whatever turns may occur in the business cycle. Future competitive threats to wage standards must be dealt with by organization drives, they believe, in any industry where a large number of employees remain unorganized. Nor is furtherance of the self-determination principle in every plant the goal of the unions. On the contrary, the unions contest the right of employees of a particular company to stay out of the union and thus constitute a threat to the wage-stabilization objectives which most employees in an industry appear to desire.

One would be naïve to think that differences about the place of wage stabilization in bargaining is essentially an issue between labor and industry. It is much more a difference of opinion among employers in respect to the extent to which wage stabilization is necessary to support the private enterprise system. Many employers expect the union to organize their competitors in order to avoid "unfair competition" based upon wage differentials. Such a "line-up" of union and employers on one side of the argument is encountered most frequently in the highly competitive, small-scale industries in which industry-wide bargaining has long been practiced.

In the same industries, some of the most vigorous opposition to unionization and wage stabilization has come from employees. This is particularly so when workers have previously lost their jobs as a result of the introduction of the union's standard scale and the consequent closing of high-cost plants. To some employees, unionization in the past has meant high rates at which not to work. Basic conflicts over the introduction of industry-wide noncompetitive standards of employment find employees and employers on each side of the argument.

Especially in some of the mass-production industries, like

steel, the demand of employees for a noncompetitive wage policy has resulted in the unilateral formulation of industry-wide wage policies by the national union. Even though they may be the certified bargaining agents, local unions are accorded little or no authority to deviate from the "industry pattern" in dealing with individual employers. Management then often protests that the national union has gained an undue monopolistic power and has denied individual employers their collective-bargaining rights. And it is true that, in many cases, collective bargaining in medium-sized or small companies is commonly limited to the presentation of union demands in the form of a standard contract. The employer's choice is "take it or leave it." Stoppage of production is the price of leaving it.

The lack of employer organizations that deal with industry-wide unions provides the most important explanation for the growth of what has been called the "pattern method" of wage determination. An agreement between one company and a national union can constitute a pattern for adjustments throughout an entire industry or even for bargaining in other industries. For instance, negotiations for the "second-round" wage increases in 1947 were largely in a state of suspended animation until the General Motors Corporation made its critical agreement with the United Electrical and Radio Workers Union (C.I.O.). It covered only five plants of the corporation but it expressed the views of a large corporation and a major national union upon what was an appropriate wage increase. The eagerly looked-for pattern thus became available.²⁰

Determination in this one "power center" of an overall increase of \$.15 per hour in labor costs was the magic which broke the log jam of time-marking negotiations. Bargain-

²⁰ The uniform increase is emphasized by unions on the upswing rather than standardized terms of employment for competing plants. Monopoly control is then used for the offense rather than for defense. But the demand for a uniform increase is frequently accompanied by a program for "eliminating inter-plant wage differentials" in addition.

ing in many industries and plants was immediately renewed but, for all practical purposes, the issue was restricted to the way in which the established \$.15 increase would be allocated between general "across-the-board" increases and so-called fringe items. So potent had the pattern-making type of wage determination become in recent years, that a new theory of collective bargaining had been conceived—the "power center" theory. Essentially, this theory explained what happens when unions have sufficient economic power to carry out their wage programs throughout an industry while the companies refuse to engage in industry-wide or joint-employer collective bargaining.

For all of the insistence by management upon the need for collective bargaining adapted to the needs of particular plants, few companies in the mass-production industries were desirous of arriving at any final wage settlement with their union in 1947 until a pattern had first been set in some "pilot" negotiation. Once a pattern was set, wide deviations from it were rare and unusual. No management wanted to pay more than its competitors, and its employees would not take a smaller increase.

As a matter of hard fact, the desire of competing companies for some sort of stabilizing pattern for use in determining wages is every bit as strong in the ranks of management as in the labor movement. Strong supporting evidence for this view can be found in the widespread application of the first-round wage increase of \$.185 per hour in 1946 and of the second-round "package" of \$.15 per hour in 1947. Other experiences lead to the same conclusion.

Competing concerns, not dealing with any union at all, frequently arrange to clear wage information so that the policies adopted for each company will be "in line with what is being paid by the rest of the industry." And it may be recalled that one of the features of the Fair Labor Standards Act of 1938 (known as the Federal Wage and Hour Law) most widely commended by employers is that which makes

minimum wages uniformly applicable to all units in an industry. The dispute over wage standards is not so much about making certain labor standards uniformly applicable between competing concerns as over the level at which standards are fixed and over the right of the unions to become powerful enough to participate in their determination. Recognition of these facts would go a long way in the direction of making collective bargaining work.

Organizing for collective bargaining, then, involves the formation of unions strong enough through job control to stabilize working conditions within a plant and between competing employers. This characteristic of union organization is not a consequence of the Wagner Act. It derives from the demand of most employees for organizations capable of effectively limiting their economic insecurities. By assisting employees to organize, the Wagner Act aided the employees to attain an objective to which they have always striven. As long as there is a free labor movement, unions can be depended upon to follow policies designed to restrict competition between employees for jobs.

BALANCING THE ACCOUNTS

A resounding vote of "no confidence" in the labor policy of the Wagner Act was recorded on June 23, 1947 when Congress finally passed the Taft-Hartley Act over President Truman's veto. That vote was an expression of a deep and a widespread public dissatisfaction about the state of industrial relations. The government policy of assisting in the formation of unions and then making labor and management responsible for working out all their problems by collective bargaining was in disrepute.

Relations between the union and its members were a matter of deep concern especially since some members felt that their own organizations were too "undemocratic." The public also concluded that it had a vital stake in collective bargaining. The government was called upon to supervise

negotiations at least to the extent of making sure that the parties followed procedures adapted to the consummation of agreements and avoidance of strikes. Laws to resolve certain issues between labor and management might even be necessary whenever the record showed that the parties couldn't satisfactorily settle them by agreements. Above all, work stoppages which led to public emergencies shouldn't be called as a means of settling differences between unions and management. These were some of the principal reasons behind a rather widespread public call upon the government to "move in."

Management blamed the Wagner Act and organized labor claimed that industry had wilfully created a synthetic demand for new labor laws. Neither argument adequately explains what had happened. The overwhelming sentiment for a new labor policy was created by the failures of collective bargaining on which blue-chips had been heavily placed by the Wagner Act. Organized labor and management were unable satisfactorily to reconcile their differences by use of their own devices.

A sober evaluation of some basic principles of industrial relations is called for. Nearly everyone still agrees that collective bargaining is the best way—if it will work. Balancing the accounts of the varied and often hectic history of industrial relations under the Wagner Act shows two significant failures in collective-bargaining practice and two major defects of collective-bargaining theory.

Organized labor and management were unable adequately to reconcile their differences over union security and industry-wide bargaining. That is where collective-bargaining practice fell short. Problems arising out of an unprecedented concentration of power in the hands of unions and out of strikes that caused national or local emergencies were doubtless even more fundamental. As respects these two problems, previous theories and concepts of collective bargaining proved to be lacking.

Union Security

In most of the arguments between management and labor over union security, the right of employee self-determination is accorded a major attention. The fundamental issue, however, is over the right of unions to control all the jobs in a plant and all the jobs in competitive plants. Is the labor movement a job sovereignty or a voluntary association of employees subject to regulation by the state? The issue is not commonly phrased in such blunt terms. They are necessary, nevertheless, to define the problem adequately.

An answer seems to be in the making. There is a wide public recognition of the need for unions to have extensive job control to enable them properly to perform their functions. At the same time, one can have but little doubt about the general conviction that job control is not an inherent or an inalienable right of a labor union. Unions are not entitled to job control irrespective of the use made of their power or without checks and balances to insure against abuses of that power.

Legitimacy of the job-control objective is conceded. However, a majority of the employees affected must express a willingness to entrust such power to their union. The employer must also agree to accept the obligations which he has to assume under a union security clause. The essentiality of voluntary action is thus reaffirmed as respects union organization, and persuasion takes precedence over inherent right even in the labor movement's pursuit of its objectives.

A satisfactory solution of the union-security issue in collective bargaining requires acceptance by labor organizations of the principle that exclusive job control is not an inherent or an inalienable right but one which can only be gained from the confidence and good will of employees and employers toward the union. A collective bargaining solution of this issue also depends upon management recognition of the essentiality of job control to the organization of strong,

permanent unions. In this connection, management might well review the employee responsibility aspects of the question that have already been discussed.²¹

It is fully within the power of organized labor and management to retain collective-bargaining jurisdiction over the union-security issue by handling it better than they did during the term of the Wagner Act. Even though union security has been "disposed of" for the time being by the Taft-Hartley Act, this issue need not always remain subject to the vagaries of legislative treatment. It could be brought back to the bargaining table, where it belongs, by an improved form of industrial self-government.

Multi-Employer Collective Bargaining

In appraising the difficulties of the past ten years in the field of industrial relations, one fundamental conclusion is inescapable. Acceptance of collective bargaining by management is not complete until there is acquiescence in the idea that working standards, notably as respects wages, may have to be established among competing plants for stabilization purposes. Certain aspects of industrial relations are not strictly or even primarily intra-company matters.

Attention to the establishment of work standards throughout a competitive area, sometimes on an area-wide or even on an industry-wide basis, is an indispensable part of collective bargaining if the impact of competitive forces upon labor standards is to be restrained. Such restraint is of the very essence of collective bargaining.

Prosecuting the stabilization objectives of collective bargaining does not necessarily require a complete regulation of all working conditions, nor does it necessarily imply rigid, industry-wide wage formulae. A considerable degree of flexibility may be worked out. Stabilized differentials or uniform wage changes may be the kind of standards with proven usefulness in many cases. What is important is an

²¹ See page 49.

acceptance of inter-company policy determination as a legitimate part of joint dealings.

Stabilizing wages and other conditions of employment through collective bargaining, but with a due regard for the necessities of a competitive economy, is one of the very difficult tasks with which negotiators must deal. Any effective program of wage stabilization is certain to assign relatively heavier burdens to high-cost concerns. To them, any inflexibility in labor costs represents a dangerous increase in the risks of business operation. One of the essential purposes of collective bargaining, however, is to prevent these very companies from paying substandard wages as a means of selling goods at a profit in competition with more efficient companies. Sometimes it is said: "Substandard wages are a subsidy paid by the workers to compensate for managerial inefficiencies."

All too frequently, the stakes involved in setting up standards are obscured. Ability of the small concern to get started or to survive is sometimes emphasized to the exclusion of all other considerations. Actually, size of establishment does not invariably determine the degree of efficiency. Where it does, adequate provision could be made by flexible provisions in any stabilization program to prevent discrimination against small companies.

Competition based upon management efficiency can be intensified by the establishment of stabilized working conditions through collective bargaining. By the same token, standards applicable to competing concerns affect the total opportunities for employment and the total amount of goods which will be produced and sold. Under any effective wage-stabilization program the jobs of some employees will be placed in greater jeopardy and profitable operation of some plants will become a more difficult undertaking.

Wages can be "taken out of competition" with proper regard for the maintenance of full employment and maximum production only by fixing a relatively low standard wage for

rigid application (so that too many plants and too many jobs will not be eliminated) or by adopting a higher standard along with provisions for upward and downward deviations to meet the peculiar necessities of particular plants. Either approach has practical disadvantages and so the problem of "industry-wide bargaining" remains largely unsolved.

The failure of collective bargaining to settle the wage-stabilization problem has resulted in many calls upon Congress to outlaw industry-wide bargaining. Such a side-stepping of the issue is not possible. Demands for stabilized working conditions come from the great mass of wage-earners and, in the most highly competitive industries, from many employers as well. Memories of what happens to wage-standards in a depression, or in a recession, are still too vivid to allow wage-stabilization objectives to be forgotten. The real question is whether this problem is to be handled by labor and management around the conference table or by legislators in the halls of Congress.

Concentration of Union Power

The broader problems which have emerged as a result of the concentration of unprecedented power in the hands of employee organizations must be placed in a different category from either union security or industry-wide bargaining questions. Does the vast concentration of power which unions require to attain their objectives make collective bargaining incompatible with the operation of our kind of society? Concern over the question has become so general that union leaders have to take cognizance of it.

According to the theory of collective bargaining, the interests of employees can be best protected by the creation of unions having a bargaining power equal to that possessed by management on the other side of the negotiating table. An employer has a lockout power to withdraw from all employees their opportunity to work; a strongly organized union has a strike power to deprive the employer of the op-

portunity to operate any jobs. Such a matching of power gives the only practical meaning which can be attached to the term "equality of bargaining power." Possession of these strike and lockout powers should induce an agreement that is reasonably fair and equitable to both sides under the economic conditions prevailing at the time of settlement. Collective bargaining is supposed to work out in that way.

In passing the Wagner Act, Congress doubtless anticipated that collective bargaining in the mass-production industries would match powerful unions against powerful corporations. Perhaps there was not a full realization of the extent to which power would be concentrated in union hands once a complete control of all jobs in a basic industry was gained. Hundreds of thousands of jobs in the most vital industries of the country were to be brought under a unified direction of the union. As concentrated union power grew with the development of the labor movement in the basic industries, new and urgent arguments were advanced against the desirability of entirely free collective bargaining as the cornerstone of industrial relations. Concentration of power in big business enterprise has long appeared to be a threat to the competitive economy. That the same threat resides in big unions became vividly apparent as the labor movement grew under the Wagner Act.

Three aspects of the concentration of union power caused the greatest public concern and they should be briefly noted: (1) When employees organized on an industry-wide basis, and when the employers did not, a preponderance of economic power accrued to the union. It had the power to close down all the jobs in the industry but no corresponding bargaining power resided on the employer side. When individual employers said they could not "stand up to" great national labor bodies, it was because a shut-down of their plant meant more to them than to the national union. (2) In the big union, as well as in big industry, the individual worker can become so lost in the maze of bureaucracy that

any right to participate in affairs becomes quite indirect. The employee can become "an abstract mass in the grip of an abstract force." He sometimes calls it union dictation. (3) Labor organizations need not confine their activities to collective bargaining. Because of the great power which goes with a complete control of the jobs in vital industries, the minority national interest represented by unions could conceivably become dominant in the determination of national policy. A fear of this consequence, improbable as it might be, has evoked demands for the regulation of big unions along the same lines that big business is regulated. How to do so without scrapping collective bargaining and free unionism remains one of the fundamental problems of industrial relations yet to be solved.

Strikes Affecting the Public Welfare

A strong case can be made for preserving the rights to strike and to lockout on the ground that otherwise there can be no collective bargaining. The interdependence is readily understandable.²² With the widespread extension of employee organization, however, it has become increasingly apparent that, important though the right to strike may be as a support for collective bargaining, some work stoppages cannot be undertaken without creating critical public or national emergencies. Certain kinds of strikes cannot perform their collective-bargaining function of bringing the parties to terms because if work stoppages ran their course the whole social structure would break down. It is one thing for labor and management to engage in a private war which affects primarily their own interests, but something quite different when their struggle also involves national well-being.

The public has concluded that the right of employees to strike and the right of employers to lockout are not unqualified. A failure of the labor movement to accept this deci-

²² See pages 18 to 23.

sion resulted in an overwhelming demand for Congress to restrict the right to strike so that its exercise would not create national emergencies.

This course need not have become necessary. Organized labor and management might have agreed upon the restrictions necessary to meet the problem by setting up their own machinery to provide peaceful settlements. These parties might have worked out self-imposed qualifications to strikes and lockouts. Meeting the problem by voluntary agreement would have preserved the principles of collective bargaining and would have retained in private hands the working out of the details of peaceful settlement in a practical manner. Past experiences highlight the need for labor and management better to integrate voluntary arbitration as a part of collective bargaining so that emergency-creating strikes can be avoided.

Balancing the accounts of the Wagner Act permits an understanding of the complex industrial-relations problems which have to be dealt with in organizing for collective bargaining. A number of new basic concepts of industrial relations, as just recounted, arose out of the failure of the Wagner Act. If they are voluntarily incorporated into the collective-bargaining system by organized labor and management, it is entirely possible that the national labor policy enunciated by the Wagner Act might ultimately be re-established. Government regulation of industrial relations could again be confined to the steps leading up to collective bargaining. All other phases of industrial relations would then again become private matters within the jurisdiction of the joint dealings conducted by organized labor and management.

But the labor policy enunciated in the Wagner Act is "out" and a new one specified by the Taft-Hartley Act is "in." What the new policy encompasses and signifies are important parts of the story of government regulation of

industrial relations. Before embarking upon this analysis, the wartime labor program should be reviewed.

The Wagner Act did not reign supreme from 1935 to 1947. From 1942 until 1945, government regulation was extended as a war necessity in many directions and in unusual ways. A labor policy was built up that is significant in its own right. And since the Taft-Hartley Act is the result of experiences under both the Wagner Act and the wartime programs, it is logical next to review the policy of government intervention into industrial relations during World War II.

Chapter III

GOVERNMENT MEDIATION OF LABOR DISPUTES

THE labor policy of the Wagner Act was far from adequate to meet the needs of a great national emergency. Months before the United States became an actual participant in World War II, the urgency for a more extensive government program was felt. Mobilization of all resources for national defense included government supervision over collective-bargaining procedures.

Work stoppages had to be kept at a minimum. They couldn't be used freely to resolve disputes. A novel form of mediation under government auspices was accordingly inaugurated in 1941 by making the National Defense Mediation Board an integral part of the collective-bargaining system. In dealing with the work of that Board, this chapter focuses attention upon one of the important forms of government intervention. Supervision of collective bargaining is the theme.

Dependence upon organized labor and management to resolve voluntarily all their differences at the bargaining table by their own devices, carried an undue risk to national safety when war was in the offing. Something more than an automatic working of "equality of bargaining power" had to be evolved to bring about agreements and to protect against work stoppages. The public interest called for a perfect performance from labor and management as far as their agreement-making endeavors were concerned. In times of great

national emergency, strikes and lockouts cannot be permitted to fulfill their collective-bargaining functions even though extreme provocation exists for people to stop work or for management to close the plant.

INDUSTRIAL RELATIONS UNDER THE DEFENSE PROGRAM OF 1941

No significant changes were seriously suggested, and no modifications were made, in the government policy of aiding the organization of unions. Under the defense program, as well as throughout World War II, unfair labor practice charges were heard by the National Labor Relations Board and, where justified, cease and desist orders were issued against employers. Elections were conducted among employees to facilitate the designation of bargaining representatives. Unions were certified and employers were required by law to deal with them. Organization continued by leaps and bounds under the impetus not only of government protection but of an intense industrial activity as well.

It was fortunate indeed for the cause of maximum production that an orderly system to dispose of representation and union recognition issues had been previously established.¹ Of all labor disputes, these are among the most difficult to settle. Arising as they do out of conflicts between labor and management over "basic principles," until the

¹If the Wagner Act had not already been on the books it would surely have been invented to meet the needs of war. This conclusion is based upon what happened during World War I. Then, there was no established government policy to cover employee representation disputes. The national conference of labor and management representatives, convened in 1917 by President Wilson, had to work out principles for the settlement of representation and recognition issues. The principles finally agreed upon were quite similar to those which were later adopted by the Wagner Act. The War Labor Board of World War I administered this agreement as one of its most important functions. Its tasks were essentially different from those assigned to the War Labor Board of World War II principally because, at the outbreak of war in 1941, the Wagner Act was on the statute books. For a complete account of the National Labor Board in World War I (1917-19) see Bulletin No. 287 published by the U. S. Bureau of Labor Statistics in 1920.

Wagner Act became law they were fought out on the picket line. As World War II drew nearer, the orderly means for settling these conflicts peacefully through the National Labor Relations Board could be looked upon as a great national asset. The emergency labor policy was built upon the Wagner Act foundation.

Government jurisdiction over industrial relations had to be extended during the emergency simply because the normal consequences of a collective-bargaining impasse had to be avoided. If labor and management could not consummate agreements in their own negotiation, the dispute between them was not essentially a private affair. It concerned the national welfare. Further negotiations in which the public interest was represented became the logical next step. If two-party collective bargaining didn't produce an agreement perhaps three-party bargaining would. Mediation under government auspices was thus chosen as the first step in fashioning a national labor policy for the emergency.

The National Defense Mediation Board came into being to conduct three-party collective bargaining in those cases where labor and management were unsuccessful in working out their problems unassisted. Addition of this one simple procedural step to normal collective bargaining might appear as an insignificant modification of arrangements for joint dealing. Experience was to show that the kind of mediation introduced in the emergency defense period actually changed the functioning of the entire collective-bargaining system. Government mediation is not a practice to be casually adopted. In the defense period, "compulsory" mediation resulted in a form of government-supervised collective bargaining.

Analysis of the history of the National Defense Mediation Board permits a comprehensive understanding of the problems that arise—of the advantages and disadvantages which obtain—when government regulation of industrial relations is extended one step beyond aid to organizational activities

of employees and into collective-bargaining procedures. The interests of both organized labor and management are affected. The main reason for introducing mediation is to restrict the use of economic power as the final arbitrament. The side that possesses an excess of power faces the possibility that the gains achievable under free collective bargaining will be pared down. Government mediation also tends to make collective bargaining a process in which public representatives are accorded a right to join labor and industry representatives at the negotiating table. These and other aspects of "compulsory" mediation, to be discussed presently, are not widely perceived.

With the advent of government participation in the actual conduct of collective bargaining, workers organized not only to deal with their employers but also to have a representative capable of meeting the government agency "on even terms." This tendency, most pronounced when the War Labor Board was in operation, first became apparent in the early days of the Mediation Board. Labor and management were frequently drawn to the government agency as to a magnet. If the services of a board were readily available, why not use them? Private collective bargaining is an exacting process. If responsibilities can be shifted to the government, why not make one's job easier by making the shift? Such attitudes were not at all uncommon despite unusual efforts by the government to confine its mediation to cases in which every reasonable effort had first been made by the parties to settle their own differences themselves. Attempts at collective bargaining tended increasingly to become a matter of "going through the motions" as a preliminary to getting a case before the government board.

Other factors contributed to a substantial breakdown of collective bargaining during the war emergency. Removal of the threat of strikes and lockouts as the major inducement for arriving at a meeting of minds was the most potent one. The ultimate inducement to agree was no longer the threat

of a work stoppage. It was the threat that a government board would step into the picture. Risks were still involved in disagreements but they were minor ones as compared with a strike or lockout. Some advantages from continued disagreements might even accrue to the party with relatively weak bargaining power. Perhaps the government board would lend its assistance in getting terms that could not be wrung out through ordinary collective bargaining.

There was a growing disposition on the parts of both labor and management to "let the board decide the case." This was not solely because negotiators were anxious to avoid onerous collective-bargaining responsibilities. Nor was it only because the government board might be induced to support terms which could not be gotten in private collective bargaining. Mere availability of a government mediation board made employers hesitant about "prematurely" disclosing the terms upon which they were ready to settle. If such offers were actually made in the regular negotiations, they might be refused by the union solely as a "sound" tactical maneuver. No less than the employer's last offer would be apt to result from mediation and there was always a chance that a better deal might be secured.

Some unions reasoned: "What is there to lose by building our case before the government on top of the employer's last offer?" In order to keep this way open for more concessions, unions became wary about revealing, in private negotiations, the exact terms for which they would be willing to settle. A new principle of industrial relations was being tentatively evolved. It was: the mere establishment of a government board to mediate or finally to resolve issues not settled by agreement of the parties may substantially impede collective bargaining.

At any event, government boards of the types mentioned had to be set up during the war emergency and collective bargaining was enervated for the reasons just stated. The entire story of the extension of government regulation into

the processes of collective bargaining during World War II emerges from the histories of the National Defense Mediation Board, the National War Labor Board, and the President's National Labor-Management Conference of 1945. These histories are of interest in their own right. Here are the narratives of how a democracy went about the winning of a war. They have a further significance. They afford a preview of the problems which emerge whenever government regulates collective bargaining.

Because tripartite boards were used during the emergency, one can assess the advantages and the disadvantages of undertaking any necessary regulation as a cooperative venture between labor, management, and the government. A great experience with government regulation of industrial relations is packed into the history of World War II. Emphasis then placed upon voluntary cooperation between labor, management, and the government stands out in sharp contrast to the course taken under the Taft-Hartley Act. A comparison of the two policies should be helpful in arriving at an informed judgment about the kind of national labor policy which is best for the country over the long pull. In this chapter and the two that follow, the wartime policy is discussed.²

CREATION OF A NATIONAL MEDIATION BOARD

The National Defense Mediation Board was a product of trying times. In looking back upon the events of the past decade, one has difficulty in understanding how, in 1940, American attitudes toward world affairs could possibly have been so unsure and so uncertain. Mingled with a hope that the war would soon end was the belief that our embroilment must somehow be avoided. Many persons were convinced

² The work of the National War Labor Board is the subject of Chapter IV while the President's National Labor-Management Conference of 1945 is discussed in Chapter V.

that fighting a total war would entail the loss of all those individual and personal liberties, including collective bargaining, which are the essence of our kind of democratic state. Giving them up during war carried the danger that they might not be reassumed. The notion was widely prevalent that the battle against state totalitarianism could only be fought by preserving an "island of democracy" in a war-torn world.

Dunkirk and the fall of France brought a realization of the futility of any policy designed to preserve what we call democracy by policies of isolation and insulation. An Axis victory would result in the United States becoming a heavily armed nation living in the midst of enemies and subject to the strictest kind of government controls. Only at the frightful cost with which we are all familiar was the threat of such an insecure existence turned back. Despite earlier fears, the cost fortunately did not include an introduction of state totalitarianism even while the war was being fought. Many groups, including labor and management, were alert to see that such a price would not have to be paid.

One of the great achievements of America at war was the integration of civilian strength into the war program primarily upon a voluntary basis. In no area did so-called voluntarism more poignantly display its strength than in the wartime program for industrial relations. Even though collective bargaining lost much of its vitality, unchallengeable government direction and compulsion did not become the rule. By common consent of labor and industry, and as a result of their cooperative efforts, the peacetime system of industrial relations was substantially modified. A new system was worked out under government auspices for the duration of the war.

The international situation was so threatening in the winter of 1940-41 that organized labor and management readily accepted the need for a change in the existing national labor policy as an emergency measure. Labor disputes in "de-

fense plants" had culminated in several stoppages of production which disrupted plans under way to insure the national safety. A steadily mounting strike curve showed that collective bargaining alone could not be depended upon to avoid strikes or plant shut-downs. Only because of the tense international situation was organized labor ready to cooperate in restricting those collective-bargaining rights which had been so recently won after more than a century of effort and sacrifice. Guarding against any permanent loss of those rights was the primary task which labor leaders mapped out for themselves. In this setting, action had to be taken by the government.

Moving decisively to deal with the emergency, President Roosevelt created the National Defense Mediation Board on March 19, 1941.³ This new agency was given jurisdiction over labor disputes certified by the Secretary of Labor as threatening "to burden or obstruct the production or transportation of equipment or materials essential to national defense." A further effort to settle these disputes was to be made by the Mediation Board. Mediation assistance was to be made available to the parties in their contract negotiations and facilities for voluntary arbitration were to be offered. The Board was also authorized to institute fact-finding procedures to investigate the causes of differences between employers and employees. On the basis of such findings, public recommendations for the equitable settlement of any dispute could be made. The emergency nature of the task at hand was exemplified by the independent status given to the Mediation Board under the Office of Emergency Management.

The work of the National Defense Mediation Board constitutes a unique experiment in the use of mediation techniques as expressly differentiated from conciliation. Only

³ By issuing Executive Order No. 8716 pursuant to the emergency powers vested in the President "by the Constitution and the statutes" and "with respect to the national emergency as declared by the President to exist on September 8, 1939 . . ."

after the U. S. Conciliation Service failed to settle a case could the Mediation Board assume jurisdiction. Criticisms of the emergency program, and they were numerous, made on the ground that only "some more conciliation" had been added were not very penetrating. A distinctly new element was introduced into industrial relations. Provision was made for the "third party," representing the public interest, to interject his own ideas, and with considerable force, about the terms upon which a labor dispute should be settled. A recommendation by the mediating agency would be an important factor in collective bargaining, irrespective of the wishes of the parties. Conciliation is quite a different proposition.

Because "outside interference" with collective bargaining was in the making, the emergency mediation board was given an unusual composition. Board membership consisted of public, employer, and employee representatives.⁴ General policies were evolved by action of the entire tripartite Board. Mediation panels, selected from among the Board membership to dispose of individual cases, were always of a tripartite composition. The full significance of the direct representation of labor and management on the Mediation Board will be noted presently.⁵

One of the most notable features of the Executive Order, which gave life to the Mediation Board, was that the rights to strike and to lockout were not specifically revoked. There never was much doubt in the minds of "realists," however, that these rights could not be exercised without creating a national emergency and without leading to further governmental restrictions. The task before the Mediation

⁴ At the outset the Board was composed of 11 members—4 management, 4 labor, and 3 public. The labor representation was divided equally between the American Federation of Labor and the Congress of Industrial Organizations. As the case load increased, alternates were named for all the original representatives until finally there were 41 Board members. Clarence A. Dykstra acted as chairman until he was succeeded by William H. Davis in July 1941.

⁵ See page 104.

Board might be described as a preservation of those basic rights by making it unnecessary for labor and management ever to use them.

The tools were good but scarcely equal to the performance of a task which required nothing less than perfection. It has been said of the Mediation Board that: "The combination of mediatory and recommendatory power of a vaguely compulsory nature in a body without statutory authority raised practical problems of great moment to the public."⁶ A complete and voluntary acceptance by labor and management of the proposed government supervision of collective bargaining was a prerequisite to adequate handling of those practical problems. Charging the representatives of labor and management with direct responsibility for formulating and administering the program was both a natural and a unique step. Experimentation with a tripartite mediation board was undertaken to meet an unprecedented situation.

THE NATURE OF MEDIATION

The main idea behind the National Defense Mediation Board was to provide governmental assistance of a procedural nature to labor and management in their efforts to resolve issues between them through collective bargaining. At first glance, assumption of this role by the government might seem to interfere but slightly with the principle that labor and management should have full latitude in coming to any agreement regarding the terms of their relationship. Procedural assistance can be differentiated from what will be agreed to. It might even be argued that these parties should welcome governmental assistance in working out problems which had "floored" them.

Upon reflection a number of grave doubts arise about whether the government can give mediation assistance with-

⁶ William H. Davis, Chairman of the National Defense Mediation Board, in the Preface to Bulletin No. 714 of the U. S. Bureau of Labor Statistics entitled "Report on the Work of the National Defense Mediation Board," 1942.

out throwing its weight in favor of one side or the other. Assistance might actually turn out to be direction or dictation. The mediation board was a "mild" form of government intervention. Its establishment, nevertheless, involved a real risk that collective-bargaining rights would be materially modified. Both labor and management were on the alert to prevent the parable of the camel's nose in the tent from having a new and a modern companion-piece.

One cause of concern to labor and management was the seating of public representatives at the bargaining table. This is the essence of almost any government mediation program. Objection to the innovation could not be effectively voiced at a time when persistent labor disputes adversely affected the public interest as much as, or more than, the interests of the parties directly involved. Organized labor and management were called upon to accept a new kind of collective bargaining for the duration of the emergency. If mediation failed to produce an agreement, and failure had to be anticipated as likely in some cases, voluntary arbitration was suggested by Executive Order No. 8716 as the appropriate next step. No strikes or lockouts would occur as long as labor and management voluntarily went along with the emergency procedures designed to bring about a peaceful settlement of all disputes between them.

There was no disposition deliberately to force negotiators into the orbit of government-supervised bargaining. On the contrary, a particular point was made in Executive Order No. 8716 of the desirability of preserving and using, to the fullest possible extent, all the regular peacetime mechanisms of industrial relations. Employers and employees were called upon to exert every effort to settle all disputes in their own way. If an agreement resulted—any kind of agreement—the government had no license to intervene. If disputes persisted, labor and management were expected to give the U. S. Conciliation Service, as well as the Office of Production

Management, advance notice of any threatened interruption to continuous production. Only then would the government explore "all avenues of possible settlement." One of those avenues was certification of the case to the National Defense Mediation Board.

Functioning primarily as an advisor to the parties, the Mediation Board could suggest the terms upon which any issue should be settled. The Board could also recommend procedures, such as voluntary arbitration, to bring about a peaceful solution. "Advice" given by the Board carried great weight. There was a "reserve power" behind every suggestion. That power was an inducement for parties to accept privately offered advice. If they didn't, fact-finding procedures could be inaugurated.

Formal recommendations could then be made as respects terms which both parties should accept in order to get a "fair and equitable" settlement. Widespread public support for any recommendation of this sort was a virtual certainty under the emergency conditions which existed. This gave the Mediation Board a potent reserve power. A right to make public recommendations gave an unusual status to the Board in the performance of routine advisory and mediation activities. No final and binding determination of a dispute could be made by the Mediation Board but a certain peril had to be weighed by a disputant who contemplated a refusal to go along with any recommendation. The power of public opinion might go against him.

Although government supervision of collective bargaining during the "defense period" was restricted to mediation, recommended settlements, and fact-finding procedures, an extensive control derived from these devices. Complete comprehension of why this was so depends on understanding of the step that is taken when mediation supplements conciliation. The two terms are often used interchangeably. The adroit conciliator frequently adopts some mediation tech-

niques, with the consent of the parties, in performing his duties. Conciliation and mediation are, nevertheless, inherently different processes.

A conciliator's principal job is to keep negotiations going. As long as disputants meet around the conference table there is always a chance that they will come to a meeting of minds. To keep the ball rolling, the conciliator transmits information between the parties as requested and otherwise tries to keep negotiators at their appointed tasks. He is not supposed to evaluate or to express a judgment on the merits of opposing contentions. That could tip the bargaining scales. A conciliator is not usually expected to "favor" the position of either party.

Interjection of ideas by an "outsider" about what should constitute a fair and acceptable solution is a mediation function. A mediator may offer judgments on the issues and on the merits of offering contentions. Mediation can thus affect the bargaining positions of the parties. It follows that the use of any mediation service should be a matter of voluntary choice of the parties if the principles of collective bargaining are to be preserved. Mediation should be looked upon as a means of developing outside value judgments as to the merits of the controversy and a mediator should have an ability to initiate suggestions for possible compromises.

Distinguishing between conciliation and mediation is far from an academic exercise. It has a highly practical application. Labor and management have long accepted the desirability of a government conciliation service. They have both usually opposed any formal government mediation service such as provided in the Taft-Hartley Act. These parties know that if the government takes on a bona fide mediation function, its agencies will assume a duty to propose solutions which may be of an entirely different character from any being worked upon in private negotiations. Or support may be given by the mediating agency to either

the labor or the management contentions. In either case, the mediator has passed a judgment upon the merits of the dispute in controversy.

Despite every safeguard to assure that a mediation board will exercise only advisory functions, its actions will tend to redress the relative bargaining positions of the parties. Relative economic power is not looked upon as the sole and ultimate determinant of a labor dispute when a strong government mediation agency comes upon the scene. Whatever weight that agency possesses is thrown upon the bargaining scales when it advises a certain settlement. A new evaluation of their positions has to be made by labor and management in the light of such advice. In particular, the consequences of rejecting a recommendation have to be balanced against any insufficiencies of the terms proposed.

A mediation board may have great influence in industrial relations when it is an established agency of the government and when it also possesses a power to issue recommendations based upon formal fact-finding. Experience with fact-finding boards, especially during early reconversion days, leaves little room for doubting that an impartial recommendation supported by the executive branches of government is "first cousin" to compulsory arbitration. Since management usually won't give more and the union generally won't take less than the recommended solution, the latitude for bargaining is narrowed and may entirely disappear.

The National Defense Mediation Board was just about the strongest kind of a mediation agency which could be devised. A long stride toward government regulation of collective bargaining was taken when this Board was created. Labor and management could, nevertheless, accept the Board with confidence for just one reason. Its composition was the saving grace. The tripartite set-up of the Board meant that the new policy was subject to a veto by either labor or management at any time. Only as long as labor

and industry representatives continued their membership on the Board could the mediation policy be carried out. Checks and balances were thus created to protect against government dictation and against an arbitrary use of the great power which resided in the board.

Considerable comment was made in 1941 about the "incongruity" of giving direct representation on an "impartial" government board to outright advocates of management and of labor points of view. This was, in reality, no greater departure from normal practice than giving seats at the bargaining table to representatives of the public. The tripartite mediation board was truly an unusual experiment. It was based upon the idea that, during the emergency, collective bargaining could not be carried on as a process that would enable organized labor and management to work out their affairs as a strictly private business matter. Under the stress of the emergency, the final collective-bargaining negotiation in "tough" situations would become a three-way conference with public representatives sitting in.

During the so-called defense period, public participation in negotiations between labor and management was confined strictly to cases in which an interruption of production was threatened. Moreover, the mediation board was concerned primarily with reaching a solution acceptable to labor and management and without too much regard to the terms of settlement. An agreement, irrespective of terms of settlement, was the goal.

Later on, when war was actually upon us, the public interest in collective bargaining was extended to cover wage determination as a part of the over-all effort to control the consequences of inflation. This extension of the public interest will be taken up in due course.⁷ For the present, it is sufficient to reiterate that, through the National Defense Mediation Board, public representatives were accorded a right to participate in collective bargaining over the condi-

⁷ See page 171.

tions of employment. This was something new in industrial relations.

THE NO-STRIKE POLICY

As initially promulgated, the labor policy for the defense period did not outline what steps would be taken by the government if crippling strikes took place despite every effort of the Mediation Board to avoid them. Rights to strike and to lockout were not given up. These rights could, at least theoretically, still be exercised. No penalties could be imposed against any employees who struck to enforce their demands. Interruptions of production would have to be dealt with as, and if, they occurred. A crisis would be faced if either party to a dispute refused to utilize the procedures of the National Defense Mediation Board or to accept its recommendations. The sufficiency of the program, as promulgated, depended in the last analysis upon voluntary acceptance by labor and industry.

Any work stoppage in a vital armament plant could actually not be permitted to run on very long without disastrous consequences to the country. These were "too little and too late" days. When the first serious stoppage occurred, the final detail of the national labor policy would have to be filled in. A crucial question was always in the immediate background. What should be done if the exercise of private rights, still retained by labor and management, seriously interfered with the mobilization of national resources for defense and for war. That such interferences could not long continue was a foregone conclusion. But devising a plan for eliminating them without recourse to totalitarian state methods was the big problem.

For a number of months it appeared that the critical question might not arise. Surprising as it may seem, a unanimous and a voluntary acceptance by labor and management of the procedures instituted by the Mediation Board seemed possible. Strikes were in progress in more than half the

cases certified to the Mediation Board.⁸ They were all called off when, prior to taking any action in such cases, the Board requested a resumption of production. In cases where no strike was in progress, the Mediation Board asked that production continue while the dispute was being settled.⁹ Great stress was laid upon the duty of labor and management to use the government's mediation machinery but no advance commitment to accept a Board recommendation was sought. The Board might later urge that a voluntary arbitration agreement be consummated but only after mediation had first been tried. This no-strike policy proved to be eminently effective.

The notion that work should continue while a dispute was being mediated, even though a contract had expired, was a marked departure from previous practices followed in most industries. It was entirely contrary, for example, to the concept of "no contract—no work" which had long been a guiding principle for coal miners and for many other employees as well. Effectuation of the no-strike policy required the use of Mediation Board procedures as a substitute for direct economic action. After all, strikes occur when workmen choose not to labor either under existing conditions of employment or at terms offered by their employers. In asking employees to continue to work under terms consid-

⁸ Of the 118 cases over which the Mediation Board assumed jurisdiction, strikes were in progress in 64 cases, or in 54% of the total, at the time of certification by the Secretary of Labor. Source: Bulletin No. 714, U. S. Bureau of Labor Statistics. "Report on the Work of the National Defense Mediation Board," 1942, p. 8.

⁹ The plan of the Mediation Board for ending or forestalling a stoppage of production commonly included provision for the retroactive application of any wage adjustments subsequently agreed to. No sound reason then existed for engaging in strike action since fundamental rights were fully protected. People would not have to work under conditions about which they were protesting if their contentions were later found to be meritorious. Any losses which occurred from staying on the job could be remedied. The retroactive wage adjustment feature was a major support for the no-strike policy developed by the Mediation Board. It also later became an integral part of the administration of the no-strike no-lockout agreement by the National War Labor Board.

ered by them to be unsatisfactory, the Mediation Board had to have the confidence of employees that they would be given equitable treatment. The confidence of employers was similarly essential. Management was being asked to continue operation of their plants without any certainty about what their costs would be and with the knowledge that retroactive adjustment of wages would invariably be recommended.¹⁰

In appraising the various facets of the no-strike policy during the defense period, one aspect stands out much more vividly now than it did in 1941. It concerns the question: If mediation is to be used as a substitute for economic force, how far does a recommended settlement have to take relative economic power into account? The question is a recurrent one in the conduct of mediation and arbitration proceedings.

A recent tendency to say "realistically" that the "lion's share must go to the lion" turns out to constitute a highly theoretical and unsatisfactory formula even upon cursory analysis. No one can anticipate even in approximate terms what conditions of employment would finally obtain if a work stoppage actually took place. Sometimes it is even impossible to estimate which side would be the more powerful lion if prowess is measurable by deeds and not by words. Trying to anticipate what the terms of settlement might be if a strike actually occurred is an entirely unrewarding mental exercise. Economic warfare turns on unforeseeable happenings and surprising personal reactions. What both parties "down deep" are willing to settle for, instead of taking their chances on a strike or lockout, is the real key that a mediation board seeks to discover. Mediation cannot be effectively carried on as a process for "discounting" the ex-

¹⁰ Full credit is due to William H. Davis, Vice Chairman and later Chairman of the National Defense Mediation Board, for effectuating the voluntary no-strike policy which was the back-bone of the labor policy during the war emergency. Mr. Davis was also Chairman of the National War Labor Board from 1942 to 1945 and Director of Economic Stabilization in 1945.

ercise of economic power. It does have to work within the limits of terms that are appraised by the parties as more unacceptable than the risks and the losses of a strike. In such terms, agreement-making can be furthered.

During the war emergency, the economic power of employees was higher than at any previous time in history. So was the power of many employers. The country could not do without the services of either at any price. Unions sometimes requested "concessions" on the ground that foregoing the right to strike meant the loss of an opportunity to get far more through direct action than the Board would ever recommend. And management often protested that the unions gained much more from the government than they could possibly have gotten through their own efforts.

A greatly increased economic power deriving solely from the emergency had to be appraised as a sort of "unearned increment" not exploitable under the "rules of the game" prevailing when one's country is at war. Only a few on both sides believed they were under no compulsion to accept those rules. They created the crises. Acceptability of recommendations made by the National Defense Mediation Board depended, then, upon the willingness of labor and management to suspend the use of relative economic power as a criterion of fairness and equity and instead to accept the judgment of a tripartite board.

Development of the no-strike policy, in the terms just described, was an ambitious undertaking. Its effectuation was the only sound way of supporting the ambitious production program which had been mapped out while providing, at the same time, an assurance that private collective-bargaining rights would not be overturned. A principle danger of the mediation program was in the potentiality it had for creating labor disputes as well as for settling them. All the risks and losses of work stoppages could be avoided by going to a government board and asking for a recommended settlement of disputes over every conceivable kind of issue.

When a mediation board was set up to make recommendation hearing upon all labor disputes, past boundaries limiting the scope of collective bargaining became uncertain.

There were neither limits nor restraints upon the nature or the size of the demands which could be thrown first into collective bargaining and then to the Mediation Board. So-called fringe items, which were normally traded off early in the negotiations, could readily be passed along to the government as unsettled issues. From the union standpoint, everything was to be gained and nothing to be lost by getting unusual issues before the Board. A recommendation might be secured to help the cause of a more embrative collective bargaining. Bigger and better labor controversies than ever could thus be easily created. Many cases referred to the Mediation Board actually included dozens and even scores of unresolved issues. Sometimes the Board had to recommend all the detailed clauses that make up a complete contract. Under such circumstances, mediation becomes a substitute for collective bargaining rather than a facilitating device to help the parties agree. These were some of the risks which had to be assumed as a price for the introduction of government mediation.

The no-strike policy of the Mediation Board was outstandingly successful during the early stages of the defense period. If they were on strike, employees went back to work when jurisdiction of their case was assumed by the Board. Employees refrained from striking pending the disposition of their case under the new policy. Most of the disputes which came before the Mediation Board were settled by agreements satisfactory to both parties. These successes were possible only as long as organized labor and management were willing to acquiesce in general policies adopted by the Board and in its recommendations made in particular cases. Dependence of the entire arrangement upon voluntarism was shown beyond all doubt when the C.I.O. members finally withdrew from the Mediation Board and ended

its effectiveness. The circumstances surrounding this withdrawal will be discussed presently.¹¹

During its relatively short life, the Mediation Board ploughed much new ground and charted a course for its successor—the National War Labor Board. A deep faith in voluntarism and “a passion for agreement” characterized the policies and the procedures of both these agencies. In pointing out the essentiality of these basic principles, the members of the National Defense Mediation Board made an outstanding contribution to the development of national labor policy and to the prosecution of World War II.

WHEN MEDIATION FAILED!

A government program grounded upon voluntary understandings between organized labor and management provides the most solid policy that can be devised. Of this, there never has been much doubt. As an emergency measure, it was even considered proper for the government to exert considerable pressure upon the parties, in mediation proceedings, in order to bring about a meeting of minds. All would be well if complete cooperation existed. The mediation policy would be adequate for the needs of the country during the emergency, however, only if no serious strikes broke out.

One might argue, and with strong reasons, that the labor policy as initially announced for the defense period should have met the main problem “head on.” Ways for dealing with the inevitable strike crisis could have been spelled out before hand. Such a course had its own peculiar disadvantages. The nature and the tone of the entire emergency policy would then have been dictated by what was necessary to handle a few non-conformists. Using voluntarism as the key-note would have been impossible. In consequence, the chances of serious labor strife would have been greatly increased.

¹¹ See page 119.

The Mediation Board exemplified a policy adequate for dealing in a sound manner with the overwhelming majority of cases. All the most difficult cases would have to be taken up as problems of "crisis government." They would be handled opportunistically when and as they came to a head.¹² That disadvantages existed in such a program cannot be denied. But there was one great advantage. Emphasis could be placed upon the development of sound ways for dealing with the usual type of case affecting the greatest number of people.

Strikes inevitably did occur. Problems of "crisis government" then could not be avoided. No program for handling strikes had been worked out in advance. It could be anticipated, however, that any government action to terminate a critical work stoppage would have to include government determination of the conditions under which employees would go back to work. Here is the critical aspect of any no-strike policy. Are employees to be required to work under the very conditions they protested when they stopped work? If not, what changes in terms should the employer be required to make? On this score, during the defense period the Mediation Board would, at least, have expressed a careful judgment before a crisis occurred. There were strong reasons for carrying out a recommendation of the Board when employees were called upon to terminate their strike. But, such action would constitute compulsory arbitration. That was entirely foreign to the principle of voluntarism upon which the Mediation Board was built.

Enforcement of Mediation Board recommendations, after rejection by one of the parties, would erase the line between recommendations and compulsory arbitration awards.

¹² It should not be assumed that problems of "crisis government" could have been avoided by a program which apparently provided in advance for handling every contingency which might arise. Even where there is compulsory arbitration, such as in Australia and New Zealand, strike statistics are published. One may doubt whether less crises occur when means for handling them are anticipated in the terms of a labor program.

"Suggestions" for settlement might still be proposed as though they were made solely as a mediation proposal but the "or else" characteristics would be altogether too apparent. Both parties would be under strong compulsion to adopt a known board suggestion as their own in preference to a threatened unknown, formal recommendation that would be enforced by the government.

On the other hand, a failure to "support the Board" when a strike crisis occurred could seriously impair the ability of this agency to carry out its regular mediation responsibilities. If a Board recommendation was not made the condition of employment upon termination of a strike, then some other government agency would have to be empowered to order alternate terms. The parties could then look beyond the mediation board for a retrial of the issues. Why should one party follow any proposal made in mediation since a "better deal" might be gotten somewhere else after a strike? Conflicting recommendations from different government agencies were a possibility.

The dilemma about the status of Mediation Board recommendations after their rejection by one or both parties was never satisfactorily resolved. It could not be adequately resolved. After most careful consideration, the Mediation Board concluded that, if its continuing operation was desired, rejected recommendations would have to be put into effect whenever the government ordered termination of a strike.

The ultimate status of Mediation Board recommendations was first raised when the Federal Shipbuilding and Drydock Corporation refused to incorporate a maintenance-of-union-membership clause in a contract with the Industrial Union of Marine and Shipbuilding Workers (C.I.O.).¹³ A strike was called on August 6, 1941 over the company's rejection of

¹³ Case No. 46 of the National Defense Mediation Board. All cases referred to are reported in Bulletin No. 714 of the U. S. Bureau of Labor Statistics—"Report on the Work of the National Defense Mediation Board," 1942.

the Board's recommendation. Since the output of vitally needed ships was stopped, the Secretary of the Navy seized the plant under a directive issued by the President on August 23, 1941.¹⁴ Steps were taken to secure an immediate resumption of production. All employees returned to work "for the government" with the understanding, or impression, that the recommended maintenance-of-membership requirement would be carried out.

Whether or not the government operating agency would take on an obligation for running the shipyard in conformance with the Mediation Board recommendation could not be immediately known. Management obligations under a maintenance clause do not mature until the union requests the discharge of a member whose good standing has lapsed. The "clause" was finally invoked by the union at the Federal Shipbuilding Company. A charge was filed with the Mediation Board on November 7 protesting the refusal of the operating agency to discharge ten employees who failed to maintain their good standing in the union. Union representatives vigorously complained about the insistence of the operating agency that the plant had been seized to insure continuous production and nothing more. What happened to the labor dispute when the government seized a plant?

After an investigation of the union claim had been made, the Mediation Board filed a report with the Secretary of the Navy on December 9. Before the impasse could be cleared up, the plant was returned to private operation on January

¹⁴ An earlier plant seizure was effected under entirely different circumstances in Case No. 36. On June 9, 1941, the Secretary of War was directed by the President "to take possession of and operate" the Inglewood plant of the North American Aviation Company where production had ceased while a labor dispute was in process of settlement by the Mediation Board. The strike, of a wildcat variety, had occurred "in violation of an agreement between the bargaining representatives of the company and the workers authorized to appear before the Board." The Secretary of War was directed to take such measures as are "necessary to protect workers returning to the plant." Work was resumed and negotiations before the Mediation Board continued until, by July 1, all the issues were settled by agreement. The government then relinquished control of the plant.

5, 1942. With the declaration of war, an all-inclusive no-strike pledge was given by organized labor. In relinquishing control of the yard, Secretary Knox stated that: "Any unsettled issues . . . should be settled by negotiation and agreement; if not, they can be resolved without interrupting production by recourse to the machinery established by the President." The union security issue at this shipyard was thus bequeathed to the National War Labor Board. It became the first critical industrial relations problem which had to be settled during the war. No conclusion was ever reached as to whether or not a rejected recommendation of the Mediation Board would be enforced when plant seizure by the government became necessary to insure uninterrupted production.

A second refusal of a company to go along with a Mediation Board recommendation came when the management of the Bendix N.J. plant of Air Associates, Inc., turned down a formula for terminating a work stoppage.¹⁵ All employees were to be returned to their regular jobs without discrimination pending settlement of the various issues over which the walkout occurred. The Company stated it could not follow the recommendation because that would require displacement of new employees recently hired to take the place of strikers. When the work stoppage continued, the Secretary of War was directed by the President, on October 30, 1941, to seize and to operate the plant. This action was taken on the ground that failure of the company to follow the Board's recommendation impaired production and threatened a complete cessation of production essential to the defense of the United States.

Upon seizure of the plant and its operation by the government, the employees complied with the request of the operating agency to terminate the strike. Work was resumed under conditions existing prior to the walkout and negotiations between the union and the company were again taken

¹⁵ Case No. 51 of the National Defense Mediation Board.

up. On December 26, 1941, a completed agreement was signed by the company and the union, an affiliate of the United Automobile workers (C.I.O.).¹⁶

Only in the Federal Shipbuilding case did the issue under discussion come to a head. It was made clear through that case that if a critical production stoppage took place, the government would seize the plant and request all employees to return to work for the government. But whether the seizing and operating agency of the government was responsible for carrying out the recommendations of the Mediation Board was a doubtful point. Some government officials adamantly held the view that plants were seized for the sole purpose of getting production resumed on any basis the operating agency deemed appropriate. The Mediation Board believed that the only sound way of getting production resumed was by disposing of the underlying labor dispute in accordance with its recommendation.

A combination of mediation and plant seizure techniques made up the labor policy for avoiding work stoppages during the defense period. Some reference should be made to the reasons underlying the use of a seizure technique when mediation failed. A labor dispute was handled as an industrial relations problem by the Mediation Board. A work stoppage in time of impending war became a problem of government which had to be dealt with under the emergency powers of the President. Labor disputes became incidental to broader considerations when strikes raised the question of whether private rights should be subordinated to the general welfare.

Government seizure and operation of a plant was not to settle a labor dispute. These steps were the prerequisite to a call upon employees to work under conditions of employment protested by them as unfair and inequitable. Work-

¹⁶ After government seizure, the Board of Directors of the company replaced the old management with new officers who negotiated the agreement and signed it on behalf of the company.

ers could be expected to respond to such a call from the government as a public service not to be avoided in time of war as long as they would not be requested to work for the profit and the benefit of the employer. Plant seizure provided the basis for terminating a strike without restricting the right to strike against a private employer.

Throughout the war emergency, employees generally returned to work "for the government" after plant seizure, even though that sometimes required them to labor under protested terms of employment. In each instance, the government gave assurances to the employees that their claims, which gave rise to the dispute in the first place, would be equitably dealt with under government operation. The government commonly said: "Collective bargaining will be preserved." In this connection, the recommendations made by the Mediation Board, and later by the War Labor Board, were at least inferentially guaranteed when employer opposition was the problem. Such recommendations could readily be put into effect by the government. When the union refused a board recommendation, which was acceptable to the employers, effectuation of a Mediation Board recommendation presented altogether different problems. This was made eminently clear in the coal case that will be discussed later.

Invaluable experience was gained through the work of the Mediation Board, in the essential components of a "no-strike" policy. The most difficult problem, evoked by restrictions upon the right to strike, was in designating the conditions of employment under which men and women would be expected to work. If conditions were unsatisfactory prior to government seizure, they would invariably continue to be a source of grievance under government operation. Government seizure of a plant does not settle a labor dispute. It only changes the parties to the dispute.

A critical task is assumed by a government-operating agency when it undertakes to decide the conditions of em-

ployment in a seized plant. Only in the postwar period was the full significance of this fact driven home. After seizure of the coal mines in 1946, a "collective bargaining" agreement was consummated between the Secretary of the Interior for the operating agency, the U. S. Department of the Interior, and the United Mine Workers of America. The mine operators had no voice in the discussion and no part in the agreement reached as to how the mines were to be operated. Under these conditions, relative bargaining positions of the employers and of the union will then be partially determined by what it is worth to management to get back a full control of their plants. Plant seizure may assist in getting production resumed. It may be an unavoidable procedure in times of national emergency. It is not a practice which supports collective bargaining.

THE TRIPARTITE BOARD

Establishment of a mediation agency with broad jurisdiction, combined with emergency power of the government to seize and operate plants to prevent work stoppages, made up an extensive program of regulated industrial relations. Both labor and management felt the need of guarding against unnecessary or permanent loss of their private rights. They were furthermore concerned with the manner in which the new government regulations would be applied. Membership on the tripartite National Defense Mediation Board gave labor and management a thoroughly adequate means of protecting their own private interests.

Policies evolved by the Mediation Board would doubtless have been quite different, and the program may not have worked at all, if this agency had been composed exclusively of public members. Tripartite representation was a guarantee that government direction would be kept at a minimum and would be undertaken only with "the consent of the governed."

Basing the emergency mediation program upon the con-

sent of labor and management meant an adherence to the collective-bargaining tradition even though the practice of collective bargaining was modified. Such would not have been the case, had the private rights of labor and management been restricted by legislation. A difficult choice between voluntary agreement and legislation had to be quickly made when the emergency arrived. The compelling factor in making the choice was a judgment about what kind of system would contribute most to the maximum production of goods. The "miracle of production," which the United States wrought, convincingly supports the soundness of the decision in favor of voluntarism and the tripartite board.

Voluntarism was nonetheless an exacting course to follow in the midst of a critical emergency. The entire national labor policy was made dependent upon the willingness of labor and management to support it from day to day. Either labor or management could force a change in policy at any time by withdrawing from the Mediation Board. Looking back upon this wartime policy gives one a sober realization of the depth of our determination to preserve individual and private rights, as far as humanly possible, even while fighting a total war. There was a disposition to protect private rights even though that entailed substantial risks. Despite the existence of a great emergency, labor and management were not to be subjected to unchallengeable and arbitrary government control.

The Mediation Board was deliberately made vulnerable to the right of either labor or management members to withdraw from membership. In this "right to withdraw" was the guarantee that the emergency labor policy, as well as its administration, would be voluntary. As long as withdrawal rights were possessed, and they are inherent in a tripartite board, compulsory direction of labor and management by the government was not possible.

There were, of course, strong reasons for labor and management to remain on the Mediation Board despite con-

siderable dissatisfaction about the way things were going. Patriotism strongly acted as a block to any capricious vote of "no confidence." Although precipitate withdrawal was not likely, labor and management possessed a potent reserve power to protect their interests whenever a really serious issue arose. At all times, public members were under a constraint to fashion their proposals for settling disputes so that labor and management would at least acquiesce in them. In the performance of their duties, therefore, public members tended to act as intra-Board mediators rather than as government officials with a power to direct. The reserve power of labor and management representatives to withdraw was exercised but once during the life of the Mediation Board. Once was enough. The Board lost most of its effectiveness and a new national labor policy had to be created.¹⁷

Over the first of a long series of labor disputes in the coal industry, the National Defense Mediation Board broke up. A case involving the Bituminous Coal Operators, Captive Mines, and the United Mine Workers of America (then affiliated with the C.I.O.) was certified to the Board.¹⁸ The union was demanding union-shop contracts in all bituminous coal mines operated by the steel companies. When the operators refused this demand, a strike occurred. The work stoppage was immediately called off upon assumption of jurisdiction by the Mediation Board.

In accordance with usual practice, a tripartite panel was assigned to mediate the dispute. After a number of sessions it was unmistakably clear that no meeting of minds was possible. The panel then recommended settlement of the dispute by voluntary arbitration either by the full Mediation Board or by a special board created by the parties for the purpose. The recommendation was thus limited to the

¹⁷ Shortly after Pearl Harbor, the Labor-Management Agreement of December 1941 was consummated by labor and management representatives. This was the "no-strike no-lockout" agreement of World War II and also the basis upon which the National War Labor Board was established.

¹⁸ Case No. 20B of the National Defense Mediation Board.

mechanics for securing a final settlement of the dispute. It contained no evaluation of the relative merits of the issue. Rejection of this recommendation would be a refusal to substitute arbitration for economic force despite the existence of a grave national emergency.

The union was unwilling to follow the Mediation Board recommendation. Coal miners were ready to utilize the mediation services provided by the government but, more importantly, they were determined to enforce their demands in one way or another. Great economic power had accrued to the coal miners. Their union representatives were of no disposition to forego the gains that could be secured by using it.¹⁹ The Mediation Board was apparently expected by the union to recommend terms of settlement that reflected its enormous economic power. Whatever may be said in favor of peacetime mediation which "discounts" strike action, it was not consonant with the needs of a country at war. Public interests were then paramount. "Trade unionism as usual" could react seriously against those public interests. In the coal case, a fundamental question was raised about the government's mediation program. It concerned the criteria upon which recommendations should be made.

A second strike followed the issuance of the panel recommendation. It was terminated when the parties agreed with the President of the United States that the issue should be submitted to the full Mediation Board for a recommendation on the merits of the dispute. Voluntary arbitration was still not acceptable. On November 10, 1941, by a vote of nine to two, with C.I.O. members dissenting, the Board recommended against granting the union demand. All C.I.O. members promptly resigned from the Board in protest

¹⁹ Union members undoubtedly recalled their inability to secure gains, or to prevent losses, through collective bargaining in earlier depression years when they lacked any effective economic power. Most of them also were well aware that, in consequence, the New Deal program was inaugurated to improve the bargaining position of workers. The tables were now turned. Under the Mediation Board program, the union was called upon to use restraint in the use of its newly derived and overwhelming economic power.

against that recommendation.²⁰ The C.I.O. also requested the Board to take no further action on any pending cases initiated by its affiliated unions.

Withdrawal of the C.I.O. members did not prevent the Mediation Board from handling cases involving other unions, but the agency now only had a limited ability to carry out the tasks assigned to it. No further doubt could remain about the essentiality of a unanimous acquiescence of labor and industry representatives in the policies and decision of a tripartite board. Nor could there be any question about the potency of the right to withdraw.

For the first time, too, there came a realization of the costs that have to be borne by any party exercising its withdrawal right during the emergency. Many C.I.O. unions experienced unusual difficulties in resolving disputed issues by collective bargaining alone at a time when resort to strikes would seriously threaten the national safety. Unlike the miners, most employees were unwilling to use the strike weapon. They were anxious to continue work in spite of strong provocations to go out. There was no place for these employees to turn when employers said "no" even to their reasonable demands.

THE UNION SECURITY ISSUE

Any survey of the work of the National Defense Mediation Board would be seriously incomplete without specific mention of the constructive way in which it dealt with the paramount labor problem of the times. The issue was union security. It resulted in seizure of the Federal Shipbuilding Company. A refusal to recommend a union shop in the

²⁰ The coal strike was once more resumed. It was called off on November 24 after the parties agreed that the dispute should be settled by a final and binding arbitration award of a Board consisting of Benjamin Fairless, John L. Lewis, and John R. Steelman. On December 7, 1941, the union shop was awarded to the miners' union by a two to one decision of the Arbitration Board from which Mr. Fairless dissented. Announcement of the decision was almost completely "blanketed" by news of the Japanese attack on Pearl Harbor.

Captive Coal Mines case led directly to the downfall of the Mediation Board. The consequences of these two cases were not entirely negative. Sacrificing the Board over the union-shop issue and seizing a plant in response to company refusal to support a maintenance recommendation underlined and reinforced the values of the maintenance-of-membership formula. This was being gradually evolved as the fair and equitable solution of the argument over union security for the duration of the emergency.

Any future appraisal of the labor policy followed in World War II will be improperly oriented unless it is made with full awareness of the dominating importance of the union-security issue during the first year of the emergency. The issue was critical because the country was in the midst of widespread unionization campaigns. In thousands of companies, unions had but recently been certified. They were trying to negotiate first contracts. In other cases where initial contracts did not provide "adequate" security, unions were seeking to remedy this "defect" at a time when their economic power was on the increase. The goal of all newly-formed unions was a "strong security clause" as a phase of their organizational activity.

Union security was an issue in about one half of the cases certified to the National Defense Mediation Board.²¹ Greater importance than ever before was attached by unions to the security clause because of the emergency. All signs indicated that the right to strike could not be freely exercised for a long time to come. There were fears that employee organization would therefore be substantially slowed down and that many established unions might even disintegrate. Gains for employees would, in all probability, be limited during the war and employers could more freely choose not to cooperate with the union simply because strikes were not

²¹ They included union demands for closed shop, union shop, maintenance of membership, preferential hiring, check-off, management encouragement of union membership, and mandatory discipline for anti-union activity.

so readily available for the redress of employee dissatisfactions.

Unions were convinced that, unless preventative steps were taken, the war would at least retard their progress greatly and might even set back the cause of employee organization "by a hundred years." Winning the war might entail a loss of unions. Strong security provisions were demanded by unions as an essential accompaniment of a no-strike policy. Such clauses in agreements were always looked upon as an important means of moving forward to ultimate union objectives. Now they seemed to be a minimum protection against the possible loss of all the advances made by labor since 1935.

Needless to say, management representatives viewed the situation in an entirely different light. They urged that unions had no right whatsoever to secure government protection beyond that already provided in the Wagner Act. The demand for a guarantee of union security was looked upon by management as an attempted extortion of an exorbitant price for cooperating in the defense of the country. Management representatives implied that the war was not being fought to give unions a monopolistic power to dictate the conditions of labor. Many of the employers were quite convinced that such an issue was embodied in the argument over closed shops and union shops.

The clash of these opposing views constituted the greatest single obstacle to cooperation between labor and management. Out of the clash came the most ominous threat to maximum production. In the absence of war, the issue would unquestionably have been decided through tests of economic strength. Differences over the right to organize had constituted the big labor issue of the 1930's. They resulted in many organization strikes and finally in the Wagner Act. Union security was the number one labor issue of the early 1940's. This one couldn't be fought out on the picket lines because men and machines would be

made idle.²² Unless the issue could be worked out around the conference table, the full mobilization of the nation's industrial and human resources would be seriously impeded. The Mediation Board grappled with the problem of settling this dispute over union security.

In only one case did the Mediation Board recommend a closed shop. This was in a labor dispute between the Bethlehem Steel Company, Shipbuilding Division, and Bay Cities Metal Trades Council, A.F. of L.²³ Special circumstances surrounded that case. An industry-wide agreement, including a closed shop provision, was effective in every shipyard on the West Coast except the Bethlehem plant. The Mediation Board recommended "that the master agreement be accepted and signed by the Bethlehem Steel Co."

The recommendation in the Bethlehem case was no more than a glaring exception to the pattern of maintenance of membership which was in the making. Seven cases which resulted in recommendations for a "union maintenance clause" laid the groundwork for what was later to become established wartime policy.²⁴ Under a standard maintenance clause, all employees who are members of the union on a specified date, or who become members after that date, are obligated, as a condition of employment, to maintain a good standing in the union for the term of the agreement.

The maintenance clause was selected as a fair and equitable solution of the union-security issue for very particular reasons. It was decided that unions called upon, in the national interest, to forego the use of strikes should have their existence reasonably protected so that unionism and collective bargaining would not be war casualties. On the

²² An attempt to settle the union-security issue was made through the Taft-Hartley Act of 1947. See Chapter VI.

²³ Case No. 37 of the National Defense Mediation Board.

²⁴ These cases were: No. 31, Employers Negotiating Committee; No. 34, Columbia Basin Area Loggers and Sawmill Operators; No. 36, North American Aviation Co.; No. 43, Sealed Power Co.; No. 44, Western Cartridge Co.; No. 46, Federation Shipbuilding Corporation; and No. 57, Lincoln Mills.

other hand, a majority of the Mediation Board members concluded that no government agency should require individual employees to join a union as a condition of employment. Employees who voluntarily joined a union, however, could properly be required to maintain their membership for the term of the agreement made on their behalf. They had at least this much obligation to the process they brought into being when they expressed a desire to be represented by the union.

Maintenance of membership did not require any employee to join a union against his will and only deferred exercise of a member's right to withdraw from the union until the expiration of a current agreement. This seemed to be an entirely logical and a very reasonable definition of minimum employee responsibilities. A recognition of them would help stabilize industrial relations and protect peacetime institutions approved by the country at large. The maintenance clause has sometimes been designated as a compromise between the extreme positions held by unions and management. It was not one of those compromises made by "splitting the difference." On the contrary, the maintenance clause came from a reasoned evaluation of the various factors which went into the highly complex problem. Clarification of the union-security issue by the Mediation Board, even at the cost of its dismemberment, represents one of the great accomplishments of wartime industrial relations.

MEDIATION AS A GOVERNMENT LABOR POLICY

From 1935 to 1941, government regulation of industrial relations was limited to helping employees to organize and getting collective bargaining under way in accordance with the Wagner Act. With the emergency of 1941, the area of regulation was substantially extended. National interest in maximum production made peaceful joint dealings between unions and management a matter of great public demand.

Settlements had to become a certainty and not just a possibility. As one labor leader put it: "The luxuries of disagreements and work-stoppages had to be given up when they threatened the ability of the nation properly to defend itself from outside aggression."

Prior to 1941, collective bargaining was conceived as a sort of self-effectuating process. Unions and management were expected, in most instances, to agree "naturally" in order to avoid the costs of work stoppages. There would also quite naturally be some disagreements. This latter aspect of collective bargaining was what caused concern in the time of national emergency. How could collective bargaining be preserved when strikes and lockouts were no longer available to induce agreements to settle finally all disputes?

Strikes have always been talked about as weapons of last resort to be used only after every reasonable means to arrive at a peaceful settlement has been tried. In the Executive Order creating the National Defense Mediation Board, the "reasonable means" to be used before resorting to strike were specifically spelled out by the government. An additional role for government in industrial relations was thereby created.

Collective bargaining need not be looked upon as a self-effectuating process. Some procedures lead to agreement; others lead to strikes. Should the government provide and insist upon the use of procedures designed to facilitate agreement-making? An attempt was made by the government during the defense period to furnish procedural assistance in the making of agreements. The results have a far-reaching significance because they give some basis for answering the fundamental question just propounded about government's role in industrial relations.

The line between procedural assistance and outright direction of the terms of settlement is not easy to fix precisely in the operation of any government mediation agency. At least the line was not clearly drawn in the work of the Na-

tional Defense Mediation Board. The work of that Board showed that, in contrast to "pure" conciliation, mediation tends to involve suggested solutions from the impartial intervener. Mediation under government auspices consequently tends to make collective bargaining a three-party affair. Public representatives are given a prominent seat at the bargaining table. That is the essence of mediation.

Settlements proposed by the public representatives create pressures upon one party or the other to abandon a position despite a conviction that it could be sustained by the use of economic power. The introduction of mediation procedures invariably imposes some limitation upon the importance of economic power as a collective bargaining factor. This is sometimes highly desirable in the public interest. Because the private rights of labor and management will be affected, however, a voluntary agreement between these parties is the soundest way of establishing a mediating agency.

Does a government mediation board affect the private rights of labor and management even if its use is strictly voluntary and not compulsory? The work of the National Defense Mediation Board strongly suggests an affirmative answer. Instead of fashioning compromises and agreements in their private conferences, parties are encouraged to continue their disagreement when the services of a government board are readily available. A party lacking sufficient economic power to gain its objective in bargaining may prefer to take a chance before the mediation board rather than to make the concessions necessary to get an agreement. It is sometimes said: "The weaker side always wants to mediate or to arbitrate if it can. What is there to lose?"

A suggestion to mediate seems so reasonable on its face, especially when the public interest is at stake, that refusal of the relatively strong party to go along can easily result in an adverse public opinion. Voluntary mediation on a formalized basis has a potentiality, therefore, for readjusting the traditional scales upon which fairness and equity are

weighed under collective bargaining. This explains why representatives of organized labor, and of management as well, have traditionally opposed the creation of government mediation machinery. There is indeed a risk that government mediation set up in good faith to improve collective-bargaining relationships may seriously impair them.

The risk is immediate, and not potential, when mediation is virtually compulsory as it was under the National Defense Mediation Board. The scope of government intervention was greatly accentuated in the defense period by the power of the Mediation Board to issue recommendations and by the supplementary power of the government to seize plants when work stoppages occurred. By comparison with previously existing collective-bargaining practices, the labor policy of those days modified the private rights of organized labor and management in a far-reaching manner.

An understanding that the policy was "only for the emergency" helped make it acceptable. In addition, the use of a tripartite board was essential. Through this device, labor and management were given a direct voice in the proceedings and a power to call a halt whenever either believed private rights were being irreparably or inexcusably overturned. While restraints were imposed upon labor and management, the government agency was given no unchallengeable power arbitrarily to direct labor and management. Government accepted an opportunity to lead in the development of a cooperative undertaking.

The advantages and disadvantages of tripartite mediation should be carefully evaluated whenever thought is given to setting up machinery for the peaceful settlement of labor disputes by voluntary agreement of labor and management. No unanimity of opinion exists as respects the desirability of such a board. Constant struggles of a tripartite board to preserve itself are inevitable. They have been singled out as a marked disadvantage of this form of organization. It is not fully understood that the effort to survive is also an

essential part of the process of hammering out acceptable conclusions. Only by taking on the crises which go with a tripartite set-up can the government introduce mediation procedures in a way that maintains the collective-bargaining tradition of voluntary agreements.

Staunch believers in collective bargaining said in 1941 that use of a tripartite board was the strongest possible basis upon which to build a wartime labor program. Others criticized the policy as unsound because the power of labor and management to withdraw resulted in temporizing and created an uncertainty about the basis of board operations. There can be no denying that the right of labor and management to withdraw almost inevitably guarantees a precarious existence for any tripartite board. That kind of an agency can only be effective if all representatives of conflicting interests are willing to cooperate in arriving at workable compromise solutions to problems. Any minority could choose to "throw its weight around" in an effort to exact a price for permitting the Board to exist. No mediation agency could perform its functions if called upon to pay constant tribute for the right to live. One can only observe that a voluntary restraint in the use of power is critical in the operation of many a democratic institution beside the tripartite board.

A great deal was learned in the defense period about government mediation and tripartite boards. Much experience was also gained about problems that arise when strikes and lockouts are eliminated from the collective-bargaining system. Mediation could be counted upon to iron out most labor disputes. Cases inevitably arose, however, where labor or management insisted that only a stoppage of production could provide a final arbitrament that "would stick." A problem of government was then superimposed upon the labor dispute. Emergency powers possessed by the Executive in times of national peril were sufficiently broad to permit seizure and operation of a plant by the government.

That course seemed to be the only way out. After seizure, employees could be called upon "to work for the government" as a public duty and regardless of personal grievances. Their right to strike against a private employer was not involved.

Production usually got under way after plant seizure but experience showed that underlying dissatisfactions still had to be reckoned with. A refusal of the government to deal with the cause of disputes would make plant seizure a form of strike-breaking by the government. So, after seizure, the government-operating agency had to act in the capacity of an employer in settling any labor disputes. Another try at mediation between labor and management would first be attempted. Only if labor and management were brought into agreement could the plant be returned to private operation. If no agreement were reached at this stage, the plant would remain in government hands. The terms of employment would then have to be fixed by "collective bargaining" between the government and the union.²⁵ Plant seizures provide neither automatic nor easy solutions to industrial-relations problems and may substantially increase the difficulty of working them out.

All in all, a vast experience in the problems of government regulation of collective bargaining was accumulated through the work of the National Defense Mediation Board. The differentiation made between conciliation and mediation has probably the greatest long-term importance. Contrasts between the two methods of settling labor disputes became clearer than they ever were. Although these methods tend to overlap in the work of outstanding conciliators, they are fundamentally quite different tools for the settlement of

²⁵ Some of these considerations, not so evident in the experience of the National Defense Mediation Board, were more readily discernible during the term of the National War Labor Board and in postwar months. In one instance, the government avoided engaging in collective bargaining as the last step only by leasing the plant to a private operator. This was the course finally followed in the S. A. Woods Machine Co. case (2 WLB Reports 159).

labor disputes. One of the very great challenges in industrial relations lies in the opportunity to develop mediation as an effective device for the furtherance of agreement-making. If the essentials and the tradition of collective bargaining are to be preserved, this opportunity has to be taken up by labor and management as one of their joint problems. Voluntary mediation machinery established pursuant to agreements between labor and management could go far in creating a sound program for keeping our industrial relations on an even keel. This is the outstanding conclusion reached from an analysis of the work of the National Defense Mediation Board.

It was indeed unfortunate for the long-run course of industrial relations that a change in national labor policy had to be made before a thorough trial of the Wagner Act had been run. On the other hand, the country was most fortunate in that extensive pioneering with an emergency labor policy was undertaken by the Defense Mediation Board before war was actually declared. Blueprints were already at hand for the guidance of labor, industry, and the government when they had to set about building a war labor policy. One master guide was the rule that, during the emergency, production could be continued by labor and management while their disputes were being straightened out. This helped make possible the no-strike no-lockout agreement which was entered into immediately after the Pearl Harbor catastrophe. And that brings us to the story of the National War Labor Board.

Chapter IV

VOLUNTARY ARBITRATION UNDER GOVERNMENT AUSPICES

THE National Defense Mediation Board was dissolved on January 12, 1942, by the Executive Order which created the National War Labor Board.¹ A new system of industrial relations was thereby inaugurated. In these times, private rights could be freely exercised only at the possible cost of losing the war to an enemy whose aim was to eliminate permanently those very same rights. Collective bargaining "as usual" was obviously out of the question during the war. Changes had to be made. The way in which they were brought about gives enduring importance to the conduct of industrial relations during World War II.

Since resort to work-stoppages to bring about a meeting of minds was out of the question, some substitute mechanism had to be created finally to settle all labor disputes. Mediation was no longer sufficient. Arbitration had to be added, under government auspices, to the machinery already available. Collective bargaining was due for another jolt in the form of greater government control over industrial relations than had previously been experienced.

A momentous choice had to be made between voluntary agreement and legislative action to give the government

¹ The War Labor Board was established by Executive Order No. 9017. No specific statutory authority supported Board activities until Congress passed the War Labor Disputes Act, over the President's veto, on July 25, 1943. This Act reinforced the authority of the Board which derived fundamentally, however, from the no-strike no-lockout agreement of December 23, 1941.

authority to create a system for making labor contracts that culminated in arbitration. Either approach was "democratic." Only by voluntary agreement, however, would the government authority derive directly from those whose private rights were to be restricted. From the public standpoint, both advantages and disadvantages would obtain under an emergency program dependent upon its voluntary acceptance by labor and management. That was eminently clear from the record of the National Defense Mediation Board.

All the disadvantages of voluntarism were heavily accented by the needs of war. Trial and error could turn out to be a costly method of procedure. But war also made the advantages of voluntarism doubly important. Attainment of maximum production—of a miracle of production—would be possible only by mobilizing the full cooperation and the unqualified support of labor and management behind the regulations to which they would have to conform. A compelling factor in the choice between voluntary agreement and legislation was the disposition of organized labor and management. Would they be willing to restrict their private rights voluntarily so that the country could expeditiously perform the one great task to which it was dedicated?

Labor and management shared with the rest of the country an anxiety to do whatever was necessary to get on with the war. An opportunity to work out a labor policy for the emergency was afforded them. They met the challenge squarely. Their voluntary no-strike no-lockout agreement of December 23, 1941, laid the most solid kind of foundation for government labor policy. The labor-management agreement of December 23, 1941, made anti-strike legislation unnecessary.

Executive Order No. 9017 was issued as an exercise of the President's emergency war powers but also in conformance with the agreement between labor and management representatives "that for the duration of the war there shall be no

strikes or lockouts and that all labor disputes shall be settled by peaceful means." Two broad duties were assigned to the National War Labor Board created by that order.² As custodian of the no-strike no-lockout agreement the Board was responsible for seeing that the pledges of uninterrupted production were carried out. It also had a duty to act as an arbitration agency in the settlement of all labor disputes. Despite many unique characteristics, the agency can most accurately be described as a board of voluntary arbitration set up under government auspices. The War Labor Board served in this capacity throughout the entire war and until its termination on December 31, 1945.

During almost four years of operation, the National War Labor Board finally determined approximately 20,000 labor disputes.³ Conditions of employment directed by the Board as the way in which these disputes should be settled were final and binding not because of an "arbitrary" government order but because labor and management voluntarily agreed to accept such orders.

As custodian of the no-strike pledge, the Labor Board went into action to terminate every important work-stoppage that took place during the war. Employees were ordered to return to work not as an exercise of governmental power but because a resumption of production was required to carry out an agreement of labor, made in good faith, that there would be no strikes.

These philosophical aspects of voluntarism sometimes seemed to have mainly academic significance when the

² On October 3, 1942, the War Labor Board was assigned a further responsibility for administering the wage stabilization policy enunciated in Executive Order No. 9250. See page 171.

³ Board records show that from January 12, 1942, until August 18, 1945, dispute certifications totaled 20,692. Of this total, 17,807 cases were closed during the same period. Throughout the war approximately 2,200 strikes occurred in cases later certified to the Board but they were terminated before any action was taken by the Board to resolve the questions in dispute. About 1,000 strikes took place in cases pending before the Board. Action on them was suspended until production was resumed. There were approximately 800 strikes in cases following a Board determination.

strains of war increased. Relating virtually every Board action back to the no-strike no-lockout agreement sometimes held little reality for a management or for a union that found its will blocked at every turn by rules and regulations promulgated by a government agency. Parties to a particular dispute often felt that the government was arbitrarily issuing directives against them and summarily rejecting their private rights. Even in such cases, most leaders of organized labor and of industry supported the decisions and actions of the Board. They never lost sight of the fundamental principles at stake in the maintenance of voluntarism.

Labor leaders supported, and often assumed full responsibility for effectuating, Board directives ordering the termination of strikes. Industry representatives exerted extraordinary efforts to convince particular employers of their duty to carry out the terms ordered by the Board. There was nothing academic about these attributes of voluntarism. No stronger backing for a government policy could be conceived. To the leaders of labor and management the no-strike no-lockout agreement was a solemn undertaking. Carrying it out in good faith was also in their long-run interests. If voluntarism worked, legislation would be unnecessary. As soon as the war was over, private rights could then be immediately resumed. Use of voluntary arbitration during the war was a sound proposition for labor and management and an unbeatable support for maximum production.

Varied and contradictory impressions persist about the nature of the wartime labor-relations program. Many misconceptions would likely be dissipated if it could ever be made clear that the National War Labor Board was not an agency for compulsory arbitration. To begin with, Board authority derived from the voluntary no-strike no-lockout agreement to which reference has already been made. By one of the terms of that agreement the President was requested "to set up a proper War Labor Board." He decided that the Board should be composed of equal numbers of rep-

representatives from labor, management and the public ranks. Establishment of a tripartite board under authority of a labor-management agreement was a firm guarantee that voluntary arbitration and not compulsory arbitration was to be instituted.

Full participation of labor and management representatives in the work of the War Labor Board required them to accept direct responsibility for making a success of the no-strike no-lockout agreement. All board members had a duty to support the program of uninterrupted production and to go along with all determinations of disputes as made by a majority vote of the Board.⁴ Arbitration awards hammered out through "bare knuckle" discussions of a tripartite board are virtually certain to be more practicable and more acceptable to the parties than decisions made by an all-public board. Representatives of the parties are present when a case is discussed and they participate in working out the answer.

Certain questions invariably arise at this point in every discussion about arbitration. Why should an arbitrator be greatly concerned about the acceptability of his award? Isn't he supposed to give the fair and equitable decision as he sees it and without fear or favor? What place, if any, does mediation have in an arbitration proceeding? Some attention has to be given to these queries; otherwise doubts will persist about whether the War Labor Board can properly be designated as a voluntary arbitration agency after all.

According to at least one prominent school of thought, an arbitrator will not perform his function properly unless he is alert to the possible use of mediation methods under certain conditions. An arbitrator is given a great power and a grave

⁴ An "unwritten law" governing the work of the Board was that "a decision of the majority" was the decision of the entire Board. The minority went along with this rule almost without exception. This was the case even when labor or management representatives opposed the majority decision most vigorously in executive sessions of the Board and issued scorching dissents. Strict adherence to the principle of majority rule is essential in the operation of a tripartite arbitration agency of the kind under discussion.

responsibility by parties who voluntarily agree to accept his judgment as binding upon them. If either disputant specifically requests the arbitrator to exercise his own judgment without any attempt at mediation, he has an unmistakable obligation and authority to do so.⁵ In the absence of a specific authorization of this kind, the arbitrator may well conduct himself in conformance with the principle that a reasonable restraint in the use of power is expected of him.

Unless the parties specifically indicate a preference for a decision instead of an agreement to settle their differences, it is fair to assume that a meeting of minds is the best possible solution of the case which an arbitrator can bring about. If both parties show an interest in arriving at an agreement, the arbitrator is duty bound to assist in that endeavor. Under these particular conditions, an arbitrator's power to order a settlement is best used when it is directed toward mediating an agreement between the parties.⁶ In conformance with these principles, an arbitrator may be looked upon as a mediator with an unusual status. He is in

⁵ Disputants frequently prefer such arbitration. They reason that arbitration should not be resorted to until after every effort to secure a meeting of minds has first been made. Arbitration is then not taken up until every chance of a meeting of minds has disappeared. Under this theory, the use of mediation in arbitration should be carefully avoided. A knowledge that such a procedure is likely to be followed in arbitration may limit the likelihood of agreement in early stages of negotiation. It is sometimes further suggested that, in order to avoid the risks of "legalistic" arbitration, the parties will frequently modify their positions enough to make a negotiated agreement possible. There is need for an objective testing of the results of arbitration conducted under varying conditions, with and without mediation, before taking an inflexible position on this subject.

⁶ The principal reason for this conclusion is the lack of any universally accepted standards of fairness and equity. This places a premium upon solutions acceptable to the parties because such solutions provide the soundest basis for good industrial relations. The view that an arbitrator should decide every case without any attempt at mediation has two essential defects. It embodies some part of the fatalistic idea that labor and management differences are irreconcilable. In the second place, the parties know more about their affairs than any outsider. If the arbitrator can be a catalytic agent to bring about a meeting of minds, the strengths of all parties will be best utilized. The writer has long held the view that mediation in arbitration should not be dismissed as a possibility unless a contrary desire of one of the two parties to the dispute is explicitly expressed.

an extremely good position to assist in a meeting of minds because of his reserve power to issue a decision. A decision must issue, of course, if no agreement is forthcoming.

Mediation in arbitration is implicit in a continuing board of tripartite composition such as was used during World War II. Extreme dissatisfaction by either party with the terms of an arbitration award, or a general loss of confidence in the policies followed, could result in a withdrawal by labor or management members. A new national labor policy would then have to be devised. With a properly functioning board, including the use of mediation, the likelihood of withdrawal was actually not very great. The highly restrictive legislation which would unquestionably follow was, in the last analysis, desired neither by labor nor by management.

A strong reason for continued labor and management support of the War Labor Board, then, was the avoidance of restrictive legislation. If the legislative route should ever appear to possess net advantages, however, either labor or management could force the use of that route by the simple expedient of withdrawing from the Board. War Labor Board authority to arbitrate labor disputes existed only so long as both labor and management were willing to go along with the arrangement as the best available under all circumstances of a wartime emergency.

The discussion supports a conclusion that the National War Labor Board was, in fact as well as in theory, a voluntary arbitration tribunal. Cooperation between labor, management and the government, instead of a "get tough" policy, was the formula selected as the one most likely to result in maximum production and sound labor relations. The entire program of the War Labor Board centered around the development of that cooperation. This will be evidenced from the detailed account of Board policies which follows.

THE WARTIME LABOR-INDUSTRY CONFERENCE

Shortly after the attack on Pearl Harbor, President Roosevelt convened a Wartime Labor-Industry Conference.⁷ Twelve representatives of industry and twelve representatives of organized labor⁸ were called together to work out an agreement upon which the government could build a system for the peaceful adjudication of labor disputes. The conferees were also asked to devise an agreement, if at all possible, assuring uninterrupted production for the duration of the war.

An outlawing of all strikes and all lockouts was the most solid underwriting of maximum production that the Conference could give. Such a program could really come into being only as a result of the voluntary action of labor and management. As a practical matter, they could restrict their own rights more drastically than would Congress.⁹ Any all-embracing no-strike policy is feasible in our kind of democracy only when instituted by voluntary agreement of labor and management. This fact should be kept very much in the foreground whenever the work of the War Labor Board is under appraisal or, for that matter, whenever changes in the national labor policy are contemplated.

Participants in the Wartime Labor-Industry Conference were not spokesmen for their respective groups. They

⁷ The conference was held in Washington, D. C. from December 17 to December 23, 1941.

⁸ The labor memberships were equally divided between American Federation of Labor and Congress of Industrial Organizations representatives. Industry representatives were selected by the Business Advisory Council of the U. S. Department of Commerce in consultation with the National Association of Manufacturers and the U. S. Chamber of Commerce. The conference was presided over by William H. Davis as Moderator and Senator Elbert D. Thomas as Associate Moderator. For a comprehensive report of this Conference see "Wartime Labor-Industry Conference" prepared and published by the twelve representatives of industry who participated in the meeting.

⁹ Events were to show that, even in the face of a great labor crisis like a nation-wide coal strike in wartime, Congress was unwilling to outlaw labor's right to strike. See page 167.

lacked any formal authority to bind labor and industry generally. Nevertheless, the experience and proven judgment of the conferees gave a good guarantee that any agreement made by them would have an unquestioned status. Grave responsibilities were assigned to these conferees. The country counted upon them to modify the private rights of labor and management in the interest of getting on with the war. Convening the meeting was an expression of faith in what we call the democratic process and its failure could have had far-reaching consequences.

A simple but effective agreement was finally consummated. It was destined to be the foundation of the emergency labor policy throughout the war. The exact terms of the agreement were:

1. There shall be no strikes or lockouts.
2. All disputes shall be settled by peaceful means.
3. The President shall set up a proper War Labor Board to handle these disputes.¹⁰

Formidable difficulties were overcome by the Conference in arriving at the voluntary no-strike no-lockout agreement.¹¹ Final success in this endeavor was a potent step

¹⁰ As a result of informal conferences held to assist the President in setting up the Board, it became apparent that a tripartite board was the "proper" mechanism for dealing with the problems of the future.

¹¹ The conferees were in disagreement about whether disputes over union security should be within the jurisdiction of the proposed War Labor Board. Industry representatives maintained that this issue should be excluded from the Board's jurisdiction and that the existing union status in each plant should be continued in the absence of a change agreed to by the parties. Labor representatives insisted that disputes over union security would have to be adjudicated by the Board if an unqualified no-strike pledge were to be given. There was agreement on all other points. The impasse was resolved by the President. In a letter to the Conference dated December 23, 1941, he stated that "The three points agreed upon cover of necessity all disputes that may arise between labor and management." The employer representatives then accepted "the President's direction for a peaceful settlement of disputes and the establishment of a War Labor Board." When this important difference was so resolved, the no-strike no-lockout agreement was complete.

in the mobilization of the civilian economy for war. When work-stoppages have to be eliminated, as during a war, the soundest way of restricting the rights to strike and to lockout is by voluntary agreement of those directly affected. That was the way it was done in December 1941. The Labor-Industry Agreement gave lie to the Nazi idea that our democracy breeds so much factional strife that it cannot be strong in war.¹²

The no-strike no-lockout agreement made it possible to bring a War Labor Board into being as an agency responsible for carrying out an understanding between labor and management and not as an agency imposed upon these parties by the government. Decisions of the board would have status because the parties agreed that board determinations would be final and binding upon them. Strikes and lockouts were outlawed because labor and management voluntarily agreed to restrict the exercise of these fundamental collective-bargaining rights during the war. These agreed-to restrictions are not characteristics of compulsory arbitration.

Since those participating in the December 1941 Conference had no specific authority to speak for all labor and all industry, many doubts have been expressed as to whether the wartime policy was really voluntary after all. Reservations on this score are entirely understandable if no account is taken of developments subsequent to the Conference. An overwhelming majority of employees and employers throughout the country approved and ratified the labor-management agreement as the best possible way to meet the needs of war. They embraced the agreement as their own by voluntarily changing union and company policies to

¹² The no-strike no-lockout agreement was not perfectly adhered to and it was seriously violated on a number of occasions. These stoppages of production should not be condoned but it is only fair to note that they did not prevent the "miracle of production" which came to pass. Our production record is sufficient evidence of the soundness of the wartime labor policy.

conform to the new national pattern. They decided to go along.

In many cases, perhaps in most of them, a union or a company accepted a War Labor Board "directive order" with great reluctance. A strong disposition to reject an award was to be expected whenever one of the parties believed the Board action was either inequitable or an improper reflection of what might have been gained through a strike or a lockout. Far more important than any of these private considerations was the need of the country for uninterrupted production. That required an absence of strikes and lockouts regardless of provocation. Not to strike or to lockout in the face of provocation was the vital part of the agreement which was made. An almost complete acceptance of War Labor Board decisions can be pointed to as the best evidence of general labor and industry ratification of the agreement entered into by their representatives in December, 1941. That agreement can very properly be alluded to as a voluntary understanding between American labor and American industry.¹³

The President appointed twelve regular members to constitute the National War Labor Board. Equal representation was given to organized labor,¹⁴ industry, and the public.¹⁵ In agreeing to serve on the Board, labor and

¹³ Of approximately 20,000 dispute cases handled by the National War Labor Board, there were only 50 in which the final determination was rejected and which were also serious enough to require further action by the Executive branch of the government. These cases were certified to the President or to the Director of Economic Stabilization. The serious "compliance cases" were about equally divided between union and management rejections. In 40 cases, plants were seized and operated by the government. The real "news" was not in the 40 critical cases which received the publicity, but in the approximately 20,000 awards of the voluntary arbitration tribunal which were accepted by labor and management.

¹⁴ Labor representation was equally divided between the American Federation of Labor and the Congress of Industrial Organizations.

¹⁵ Alternate industry and labor members were provided from the start and arrangements were later made for the designation of substitute industry and labor members. A Board resolution providing for substitute members was approved by the President in August 1942. The four public members

management representatives assumed a direct responsibility for seeing to it that the agency proposed by them would operate successfully. Each side shared a duty with the public representatives for developing procedures and policies that would insure a peaceful settlement of all labor disputes.

JURISDICTION OVER ALL LABOR DISPUTES

In several particulars, the National War Labor Board was a unique agency for voluntary arbitration. Arbitration of disputes over agreement terms is ordinarily inaugurated only after exact issues have been joined. A stipulation to arbitrate, covering only a particular dispute, is then executed. The issues to be decided by the arbitrator are known before arbitration is selected as the method of settlement.

An agreement to arbitrate represents a conclusion of the parties to a dispute that it is preferable for an impartial party to decide certain points than to stop production over them.

Not all the issues that arise over the terms of a new agreement are considered to be arbitrable. Some issues can be arbitrated with relatively little risk. Others that involve basic principles may have to be fought out.

No issue-by-issue and no case-by-case selection could be made of the disputes to be submitted to arbitration during the war. All issues were covered by the no-strike agreement and by the general agreement to arbitrate. Contrary

served full time. They had no alternates until November 21, 1943, when Executive Order No. 9395a made provision for alternate public members. Enlargement of the board was occasioned by the increased volume of cases that had to be handled under the wage stabilization program. Shortly after the Board started to function, associate public members were added by Executive Order No. 9038. They were to be assigned to critical dispute cases as special mediators. On April 4, 1945, through the issuance of Executive Order No. 9353, the distinction between regular and alternate public members was dropped and public representation was thereafter through eight regular members.

to ordinary practice, some of the items to be arbitrated were not even known when the voluntary arbitration understanding was arrived at. They would arise in the future. In giving the War Labor Board jurisdiction over *all* labor disputes arising during the emergency, labor and management ploughed new ground in the use of voluntary arbitration. Even those issues ordinarily classed as non-arbitrable were to be finally decided by the Board. This became clear from even a cursory survey of known existing differences.

A serious impasse between labor and management representatives occurred during the Wartime Labor-Industry Conference over the policy for disposing of disputes about union security. Industry representatives sought to make this issue non-arbitrable by excluding it from War Labor Board jurisdiction.¹⁶ The final understanding, suggested by the President, was that the Board should decide all disputes which, if unresolved, "might interrupt work which contributes to the effective prosecution of the war." Union-security issues were to be submitted to voluntary arbitration. They were formerly high up on the long list of non-arbitrable matters.

¹⁶ In arguing for their position, the industry representatives urged that principles governing union status should be adopted along the lines followed in World War I. The War Labor Board of World War I did not start to function until certain principles to govern its operations had been worked out by labor and management. The major point agreed upon in 1918 was that the prior status of the union in any plant would be maintained during the war unless a contrary agreement was entered into by the parties. Labor assented to this principle in 1918 in return for management's assurance that employers would not interfere with the organization of employees and would collectively bargain with chosen union representatives. Between the two wars, the National Labor Relations Act was passed. Freedom from employer interference in organizing was not subject to consideration by the 1941 Labor-Industry Conference. The process of "organizing for collective bargaining" was well under way in 1941, however, and the principal current union-organization problem concerned the demand of employees for strong, permanent organizations. Since the 1941 conference was unable to agree upon a formula to guide the disposition of these disputes, a principle had to be evolved by the War Labor Board. The union security issue could not be shelved "for the duration" if interruptions to production were to be eliminated.

The first crucial test of the new arbitration machinery was bound to come in a dispute about union security. C.I.O. members had already scuttled the old Mediation Board over this issue. Consummation of a no-strike no-lockout agreement was threatened for a time by the position taken by industry representatives on union security. Working out the impasse over union security, in a way that would not result in the withdrawal of any of its members was the first hurdle to be surmounted by the War Labor Board.

No arbitrary decision would do. Resolution of the conflict had to be by a formula in which both labor and management would at least acquiesce. Mediation ability of the highest order was called for.¹⁷ Submission of "non-arbitrable" matters to arbitration required the board to use mediation techniques, as far as possible, in settling many controversies.

A jurisdiction over *all* labor disputes covered the "non-arbitrable" controversy about union security and every other conceivable kind of problem that might arise in the field of industrial relations. Exceptions to the Board's jurisdiction were few and far between. Disputes throughout most of the transportation industry still remained subject to the Railway Labor Act. Certain kinds of employee representation questions were within the exclusive jurisdiction of the National Labor Relations Board. Operations of the Fair Labor Standards Administration were to go on as usual. Every other kind of labor dispute could ultimately

¹⁷ Dr. Frank P. Graham, President of the University of North Carolina, was one of the four regular public members of the Board. Among many other attainments, he is a mediator of unsurpassed ability. While serving on the National Defense Mediation Board, Dr. Graham devoted intensive study to the union-security question. It became his primary responsibility to lead the search of the War Labor Board for an acceptable solution of this problem. The success of his undertaking, through widespread acceptance of a maintenance of membership formula, is a great monument to Dr. Graham's efforts. He, more than anyone else, is responsible for the fact that disputes over union security did not cause any appreciable interference with the wartime production program.

find its way to the War Labor Board. Any matter over which a strike might occur was a proper subject for War Labor Board action.¹⁸

A duty to handle any dispute that might interrupt production even made it incumbent upon the War Labor Board to "do something" about cases over which other governmental agencies had primary jurisdiction. For example, whenever foremen went on a strike to secure recognition of their union, the War Labor Board was expected to get them back on the job. If the National Labor Relations Board should hold that foremen were not entitled to Wagner Act protection in their organization efforts, a point not conclusively determined during the war, could foremen then exercise peacetime rights to strike in order to force recognition from the employer? If not, would the War Labor Board, acting to provide a substitute for all work-stoppages, decide the representation question on its merits?¹⁹

As custodian of the no-strike pledge, the War Labor Board also had to terminate stoppages resulting from rival union claims to represent employees even though a determination of the issue on its merits might be referred to the National Labor Relations Board. The Labor Relations Board lacked final and binding jurisdiction over representation issues under the Wagner Act. Unions could choose to engage in organization strikes. The War Labor Board was occasion-

¹⁸ Board jurisdiction originally encompassed all labor disputes in all non-government establishments, except railroads, irrespective of the size or the character of a business, so long as an interruption of work might interfere with the effective prosecution of the war. Under Executive Order No. 9250, issued on October 3, 1942, the Board jurisdiction was extended to cover "all industries and all employees." When the War Labor Disputes Act was passed, Board jurisdiction was specified as covering *all* employees within the term "employees" as defined in the National Labor Relations Act.

¹⁹ On May 18, 1944, by a formal resolution, the War Labor Board accepted jurisdiction over eight cases each of which involved relations between a company and an organization of foremen. The Board announced that it would settle "disputes exclusive of issues concerning bargaining rights and alleged discriminatory discharges under the National Labor Relations Act." A fact-finding board was created to investigate all other problems in the eight cases.

ally importuned by a union, therefore, to decide an employee-representation issue "on its merits" as an essential corollary to ordering workers back to their jobs.

Representation questions arising just before the expiration of a labor contract posed the thorniest of all the questions in this category. If work was to continue without interruption, conditions of employment had to be known. What would be more logical than to extend the old contract while a dispute over the terms of a new one was being worked out? Expiring contracts were widely extended as a standard War Labor Board practice. All provisions of the old contract were continued including those that gave security to a union whose status as the representative of employees was being challenged. Settling *all* labor disputes by peaceful means sometimes brought the War Labor Board deeply into the affairs of the National Labor Relations Board.²⁰

Work jurisdiction disputes between rival unions also came within the purview of the War Labor Board whenever they threatened or caused an interruption of production. Many arguments over what craft was entitled to have its members perform certain work were hoary conflicts in which emotions ran high. To achieve even temporary settlements in some of these cases, an appraisal of the merits could require the Board to interpret the meaning of unclear or conflicting provisions in union charters. Up to this time, at least, such questions were regarded as matters to be worked out strictly "within the house of labor." The mere possibility that internal affairs of unions might be submitted to outside arbitration of a final and binding nature was a shock that was pretty hard for unions to take. Yet, under the inclusive no-strike agreement, work jurisdictional disputes were made subject to arbitration.²¹

²⁰ Apart from the dilemma over extension of expiring contracts, every joint problem of the two government boards was worked out with reasonable satisfaction to all concerned by agreements between the two agencies.

²¹ Union jurisdictional questions were ordinarily referred by the Board to its labor members with a request that they work out a settlement. If the

The few examples just cited are merely illustrative of the many questions, not confined to fixing the usual terms of collective agreements, which came up for arbitral settlement under the unqualified no-strike pledge. Peaceful means for disposing of all of them had to be devised. Arbitration during the war was truly an all-inclusive procedure. Promulgation of broad industrial-relations policies by a government board was an inevitable result of the no-strike agreement. Voluntary arbitration was attempted on a scale previously deemed to be neither possible nor desirable.

Criteria to serve as guides in disposing of the host of varied issues that were either impending or in prospect could not possibly have been worked out in advance by labor and management. Their agreement to arbitrate was necessarily a simple document without a single principle to be used in deciding cases. Standards of judgment for arriving at equitable decisions would have to be promulgated by the Board itself.

An analysis of the many complex industrial-relations problems that had to be dealt with provides the virtually unanswerable argument in support of the decision to set up a War Labor Board with tripartite composition. A majority vote of the tripartite board was selected as a substitute for the use of economic strength in determining the critical issues of industrial relations. "Give and take" in discussion was selected as the alternative to pressure exerted through the picket line.

The "legislative" aspects of this kind of arbitration were of far greater importance than any judicial or interpretative functions. Unprecedented problems had to be hammered out in "tripartite discussion" instead of through strikes and lockouts. If the program worked out well, it might be looked upon in later years as a form of voluntary arbitration

labor members were unable to effect an agreement between the unions, they sought to get a specific voluntary-arbitration agreement from the disputing unions under which the issue would be determined. When these procedures failed, the Board had a duty to decide the case.

so broad in its scope as to represent an advanced form of collective bargaining or industrial self-government.

It is unlikely that labor and management would long have volunteered to give full discretion to any all-public board in the settlement of *all* labor disputes. If the tripartite composition was valuable in the work of the National Defense Mediation Board, it was absolutely essential for the National War Labor Board. Labor and management had to be "on the inside" if they were to have confidence in the way questions, extremely vital to both of them, were handled and decided. Yet the advantages of the tripartite Board arise from intangible factors and are often obscure. Disadvantages, in contrast, stand out in sharp relief. Consequently, many of the impartial industrial-relations experts forecast that the wartime labor policy as just described would prove to be a dismal failure. Voluntary arbitration of the scope proposed was viewed as a highly impractical proposition.

Estimates of the life expectancy of the War Labor Board, made by "realists" when it started to operate, ranged from four to six months. One of the most common criticisms was that a tripartite set-up couldn't possibly work. A combination of both mediation and arbitration functions in one board was widely appraised as a highly undesirable combination. In view of the exacting responsibilities assigned to the Board and because of the reasoned opinion of many experts that the agency would soon collapse, real pertinence attaches to the question: What made it possible for the Board to carry on for the full duration of the war?

The unifying force that permeated the entire country during the war was, naturally, of primary importance. Assumption of unusual responsibilities by everyone became commonplace as part of a national effort to prosecute the war with all our strength. Still another factor helps explain the longevity of the War Labor Board. Experience showed that the advantages of "tripartitism" far exceeded its weak-

nesses in time of national emergency. Full participation of labor and industry representatives in the work of the Board helped in the search for policies and for the soundest possible answers in dispute cases. A complete familiarity with Board problems and an intimate responsibility for meeting them was shared by labor and industry leaders throughout the entire country.²²

Determinations of the War Labor Board received the kind of acceptance that can come only from knowledge, understanding, and participation. The agreement to arbitrate all labor disputes became a reality largely because the tripartite composition made such arbitration possible. In addition, two procedures followed in the day-by-day operations of the Board contributed heavily to whatever successes were achieved. They were the case-by-case approach and an extensive use of mediation techniques in deciding disputes. Both procedures were important to the effectuation of all-inclusive arbitration based upon an unqualified no-strike pledge. They will be discussed in the following pages.

"THE CASE-BY-CASE APPROACH"

When the War Labor Board started operations, not a single policy or rule of procedure was available as a guide to use in deciding cases.²³ On theoretical grounds alone it could be convincingly argued that some agreement on basic principles should have been a first order of business. For over-riding reasons, to be noted directly, a plunge was immediately made into the business of deciding cases. Policies were evolved gradually through a method which came to be known as "the case-by-case approach."

This procedure of the Board has been grossly misunder-

²² Labor, management, and public interests were represented equally on the national board, on each regional board, and, in fact, throughout every phase of the agency's work.

²³ Recommendations and policies of its predecessor, the National Defense Mediation Board, were of value but even as respects these guides, underlying factors had to be reassessed by the War Labor Board.

stood. Some critics still seem to think that it resulted in an arbitration board that decided cases opportunistically without any regard to definitive policies. This particular criticism is an error. No one on the board ever had any doubt about the need for some guiding principles. They had to be built up if for no other reason than to avoid conflicting decisions in different cases with comparable facts. A willingness of labor and management to accept decisions would not long endure if board actions were capricious or appeared to be so. The case-by-case approach was simply a method for establishing precedents gradually through decisions in key disputes. A body of basic principles was evolved out of actual experience in dealing with real problems. In a sense, new common law was in the making.

Differences of opinion existed within the Board itself as respects the best way to arrive at guiding principles or points of reference. Several major defects of the case-by-case approach were readily apparent. Solution of a critical problem between one union and one company might establish a sweeping rule for general application. Neither organized labor as a whole nor all industry would be satisfied if the test case was relatively weak for one side or the other, either as respects the facts or the method of presentation.

Those directly involved in the test case would have grounds for protest if their immediate interests tended to be submerged in the general-policy aspects of the case. Moreover, in settling the test case, the Board actually would lack guiding principles and could be accused of opportunism. Parties would have to be alert to avoid being cast in what they called a "guinea pig" role. On the other hand, representatives of the general interests of labor and management on the Board had to be on the lookout to discern the little cases that might establish far-reaching principles. A case-by-case approach would also lead to the creation of great tensions and major crises over individual cases.

Many obstacles thus lay in the way of building up a body

of principles gradually. This road seemed, nevertheless, to be the most practical one to follow. By taking an opposite course, the Board would have to proceed as though it were a kind of constitutional convention. From any practical standpoint, creation of a comprehensive body of labor principles, complete and precise, before any cases were determined was just about impossible. It would also be undesirable. Principles would have to be promulgated before any practical experience was gained in dealing with new and complex problems. An inordinate degree of rigidity would also be incorporated in the program at a time when flexibility was so essential. War needs could no more be anticipated than could changes in industrial relationships which would surely take place under wartime operating conditions.

A need to minimize interference, as far as possible, with the normal processes of collective bargaining, conciliation, and mediation, argued most cogently against any wide-scale establishment of inflexible arbitration principles. Once announced as Board policy, an "approved principle" would have a compelling effect upon labor-management relationships everywhere in the country. For example, if the Board adopted a policy of settling all labor disputes over employee vacations by awarding a one week vacation for those with plant seniority of one year, further collective bargaining on this subject would not be likely. Management would give no more; the unions would take no less. Inauguration of principles gradually, on a case-by-case basis, would be a serious enough impediment to collective bargaining. To do so precipitately and comprehensively could have a devastating effect.

After careful appraisal of the situation, the odds strongly favored a start in deciding cases without any guiding principles at all. Criteria would be built up out of actual experience in deciding cases despite the heavy burden that

would be thrown upon disputants in leading cases. A great body of guiding principles for deciding cases was accumulated by the time the Board's work was completed. Long before this end of the road, many persons who originally argued most vehemently for "principles" were demanding that dispute cases be decided on their own "individual merits" rather than by reference to some "bureaucratic" rule. How to maintain adherence to principles, in order to assure equality of treatment, while still retaining a flexibility sufficient to mete out justice in individual cases is certain to be a continuing problem in any government arbitration board which might be set up.

From today's vantage point, there can be little doubt that, starting operations in the critical days of January 1942, the War Labor Board actually had no real choice but to utilize the case-by-case approach. Labor disputes had to be handled promptly as a part of the job of getting on with the war. As a matter of attaining sound relations, any kind of a reasonable decision is often preferable to uncertainty and excessive delay in disposing of an issue. This principle of industrial relations needed to be applied in the early days of the war.

A sort of constitutional convention in the field of industrial relations would doubtless have sent industrial relations into a tail-spin. That road could have been traveled only by letting current labor disputes pile up while protracted discussions about general, abstract principles were engaged in. All the anticipated problems of the future, including many imaginary ones, would have been combined into one, great indigestible mass. Even a casual inventory of the host of problems then on hand, or in the immediate offing, makes it clear that a master set of principles in the form of one great labor-relations document could never have been devised or agreed upon. An effort to deduce comprehensive policies would surely have accentuated the already wide

differences between labor and management. It might even have caused a breaking point.²⁴

Therefore, most of the important policy determinations during the war were made in particular dispute cases.²⁵ A body of principles and a set of precedents were gradually evolved by a process in which trial and error played a part. Compromises were frequently necessary in order to reconcile the fundamental interests of the labor, industry, and public representatives. It is in this connection that importance attaches to the mediation techniques followed by the Board as a standard procedure. A case-by-case approach and an emphasis upon mediation were the keys by which a tripartite board effectuated the all-inclusive voluntary arbitration agreement.

MEDIATION IN ARBITRATION

Mediation is inherent in the functioning of any tripartite arbitration board. This was especially true of the War Labor Board because of its extensive jurisdiction over current and future disputes. Labor and management members are assigned to sit on any arbitration board, among other reasons, to introduce checks and balances on the public member or members. Representatives of the parties on the board have a duty to assist in bringing about a practical decision and to see that the fundamental interest of their principals are not injured in any award that is made.

The reasons which prompt labor and management to use tripartite arbitration should be frankly recognized by the public member in formulating his responsibilities. A unani-

²⁴ Only a few weeks previous to the establishment of the Board, the War-time Labor-Industry Conference had been unable to agree about the basic principles that should be applied in deciding disputes over union security. While that was the "big" issue of the day, it was still only one of many that had to be disposed of.

²⁵ As will be noted later, deviations from this approach occurred when directives on wages were issued by the President and by the Director of Economic Stabilization in the performance of their duties under the Economic Stabilization Act.

mous award of a tripartite board is tantamount to an agreement between the parties. The "third party" ordinarily sets this as the goal toward which to strive. He is, above all, a co-worker with the other board members and is responsible for getting the assent of both of them to an award if he can.

Tripartite consideration of the facts in a case is advantageous despite a failure to secure a unanimous award. After all, formal unanimity of a tripartite board is the exception and not the rule. Informal unanimity is much more frequent. A dissent "for the record" may not be too serious. Even if none of these results obtain, and if one party on the board dissents most vigorously, an award produced as a result of tripartite discussion has elements of soundness that are not commonly present in a decision made by an all-public board.

One side can easily become emotional and noncooperative about a decision made entirely by "an outsider" especially if there is no awareness of the weight of the evidence submitted by an opponent. From their board representatives, disputants should learn directly of the cons as well as the pros of a case. Before a decision is actually handed down they should receive definite assurance from their representatives that both pros and cons were carefully evaluated in the making of an award. Acceptance of the loss of "a close one," and in good grace, under these conditions is not only feasible but likely. To take the bad with the good under fair rules of the game, especially when made by the players themselves, is as much a part of the American tradition as an unwillingness to be told arbitrarily what to do.

Full utilization of the constructive values of mediation in arbitration accounted for one of the important characteristics of the War Labor Board. This has sometimes been doubted. It has been suggested that: "Regardless of any theory, the public members held the balance of power on the Board and they called the shots." The inference is that

the agency was, in reality, very much like any other government administrative board except perhaps that the public members were subjected to extensive harassment from fellow board members.

Public members of a tripartite arbitration board wield a balance of power only when they evaluate opposing contentions and then cast a vote with one side or the other to make up the decisive majority. They then determine which contention is black and which is white. Seldom does that suffice in laying the groundwork for an equitable decision or for developing sound industrial relations.

Nor is the alternate approach a matter of mere compromise. During the war, most of the problems which arose couldn't possibly be settled in the interest of anyone by a simple choice between labor and management positions. Had that course been pursued, the Board wouldn't have lasted very long. One side or the other would have withdrawn. The balance of power approach by public members was undesirable for still another cogent reason. Positions are often initially assumed, either by labor or by management, largely from the point-of-view as to what would be ideal for only one interest. Original contentions of either side, made as a one-sided proposition, couldn't be approved without disregarding the need for mutual benefits in any bargain. And the public interests were quite demanding in wartime. Asking prices were known; taking prices had to be discovered.²⁶

²⁶ Although the position advanced by each side in the arbitration proceeding may often be regarded as "ideal" from a partisan point-of-view, labor and management have learned that a bargain is a good one only if advantages do accrue from it to both parties. When demands for "ideal" conditions are made, the parties expect to make concessions essential to produce a good bargain all around. They would often be shocked if the public members of an arbitration board conceived their job to be one of making a choice between two extreme positions. Under such circumstances, arbitration would be a highly risky undertaking for both sides. The common notion that arbitration merely "splits differences" arises as a natural consequence of the modifications of extreme positions that have to be made. This is not always the way of arbitration. There are cases in which the

In most of the dispute cases out of which major policies were formulated, public members on the War Labor Board couldn't go along with the extreme position advanced by either side. The evidence presented and the needs of the country both dictated an intermediate or alternate position as the most appropriate decision. Making an informed and intelligent "compromise" invariably required a knowledge of technical and complex factors of business operation.

Sure of the active assistance of labor and industry representatives on the Board, public members could take the lead in a search for the most workable and equitable solution. The answer, unfortunately, was not always apparent from the evidence submitted. Far from exercising any balance of power, the public members often had to suggest answers quite different from any pointed to by the parties. The support of either labor or industry representatives, or preferably of both groups, then had to be secured for the final proposal of the public members. In such cases, labor and management members had as great a balance of power as any possessed by the public members.

The day-by-day task of deciding cases on the War Labor Board usually tended to be a kind of three-cornered collective bargaining. Suggestions of the public members carried great weight in this proceeding. If labor or management failed to accept a "final proposition" advanced by the public representatives, an "all or nothing" decision, based upon the actual exercise of balance of power, might be forced. A majority vote was invariably forthcoming as the only way of forestalling such a result. The so-called balance of power held by the public members was not exercised directly. It served mainly as a reserve power.

parties negotiate and arbitrate on an entirely different basis. This is when "all the cards are placed on the table" both in negotiation and before the arbitration board. When this is done, the "rock bottom" nature of positions can usually be readily recognized. Only in such instances are public members on a board able to perform their function by exercising the balance of power and foregoing the use of mediation. Cases of this kind are unfortunately the exception and not the rule.

Intra-board mediation was the accepted process for arriving at workable and practical decisions. That was in close conformance with the basic decision made when the Wagner Act was passed. Industrial relations in America should be created out of common understanding rather than by government fiat.

Decisions could be issued after a full tripartite discussion with a high degree of certainty that the terms of an award would be acceptable to the parties directly affected. In voluntary arbitration, mutual acceptability remains as an important attribute of a first-class decision. To meet this requirement, War Labor Board procedures constituted fundamentally a process of persuasion. Much more than ideological implications prompted this approach. Industrial relations are sounder and more productive when the parties are induced to cooperate than if an attempt is made to direct their conduct. Creation of a willingness among disputants to acquiesce in board decisions was a high goal of the War Labor Board. It was set in response to the national need for maximum production. Mediation in arbitration permeated every aspect of the wartime labor program.

A unanimous board decision was usually a sure sign that a "decision" would be acceptable to both parties involved in a dispute. Those uninitiated in industrial relations may look upon such a result as no more than a theoretical possibility. All sides of the War Labor Board nevertheless joined in approving a significantly high percentage of all decisions made.²⁷ Most determinations were made by an 8 to 4

²⁷ From Board records it is estimated that well over 16% of all issues arising in dispute cases were disposed of by unanimous decisions. The percentage was held down by certain voting practices. Industry members usually voted against the "standard" maintenance-of-membership provision, for the record, while the labor members were quite consistent in voting in the same way against application of the so-called Little Steel formula. The "pro forma" votes case usually carried no threat that the decision would be resisted.

vote.²⁸ Public members would join with either labor or management to make up the majority. A dissent "for the record," but without any formal minority opinion, was looked upon with good reason as an indication that at least one party felt no elation over the results of arbitration but would go along with it. A large majority of the cases fell in this category. Even where a labor or a management dissent was so vigorous as to reflect a deep-seated reluctance of one of the parties to acquiesce, the mediation endeavors of the Board were helpful.

Disputants were seldom surprised at the terms of decisions made by the War Labor Board. Labor members on the Board were in close and constant touch with the union that was a party to an important dispute case. Industry members had a similar relationship with the individual management. Liaison of this sort was a recognized and an important part of the duties of these board members. They kept the parties continually informed about difficulties met with in disposing of the case.

Labor and management members also furnished the Board with vital information, gotten at first hand from the parties, about the effects of proposed orders upon the actual operations of a plant. Ideas about how to settle any important case were thus thoroughly tested out before they were incorporated in a "final and binding" determination. Labor and management retained contact with their case after it went before the War Labor Board. They were still called upon indirectly to cooperate in working out a solution. If such a procedure needs justification, an apparent one is readily available. The parties to a case know more about their affairs than does anyone else.²⁹

²⁸ Action by a full board of twelve members was the practice in major policy-making cases. Other cases were disposed of by nine-man and six-man boards of tripartite composition.

²⁹ Once general policies were formulated through the case-by-case approach, there was less attention to mediating issues covered by an estab-

Board determination of a major policy-making case was a relatively slow proposition. Mediation and careful checking back and forth took time. Delays occasionally became so exasperating that tensions existing in a plant over critical issues were accentuated by Board inaction. At times it appeared that speedier decisions, even though less carefully considered, might be desirable. Upon analysis, however, the net advantages of the mediation procedure always weighed heavier. Voluntary acquiescence by both sides always appeared to be more vital than the delays that were occasioned in bringing about that state of affairs. Potential compliance difficulties and the possibility of unsound relations added up to an excessive price for the advantages of speedier determinations. There was no compromise with the objective of doing everything possible to bring about as close a meeting of minds as could be gotten.

In only relatively few instances, did the unique mediation procedures fail to bring about a settlement that would be accepted, however reluctantly. Those cases were the ones in which the Board's authority to make a final and binding determination was challenged. Nonconformists disputed the applicability of the general no-strike no-lockout agreement to their particular case. If the voluntary nature of the arbitration set-up was denied, there could not very well be voluntary arbitration.

At "show cause" hearings, the War Labor Board sought to convince nonconformists of their duty voluntarily to go along with the general policy. Failure in these efforts spawned the celebrated cases. They tended to become personalized around John L. Lewis, C. Petrillo and Sewell Avery. Decisions were issued by the Board in those cases with a virtual certainty that they would be rejected. They

lished principle. It is likely, furthermore, that the methods as described were used more extensively in National Board cases than in Regional Board cases. The mediation processes were of most significance, then, in arriving at policy-making decisions in major cases. These were the critical issues and the critical cases.

were not voluntary arbitration awards for the simple reason that the parties would not accept them as such. It would be entirely erroneous to look upon awards in these cases as compulsory arbitration determinations. Quite the contrary was the case. They were no more than "recommendations."

A refusal of one of the disputants to accept a Board ruling raised exactly the same kind of compliance questions that were faced earlier by the National Defense Mediation Board. In other words, War Labor Board determinations had the status of final and binding orders only when both parties to a particular dispute voluntarily accorded that status to them. Acceptability of awards to both parties to a dispute, and the use of mediation to bring about that condition, were among the most essential elements of War Labor Board operation.

Refusals to accept the results of arbitration arose out of two basic attitudes. On the one hand, management did not genuinely recognize its obligation to accept collective bargaining as the way to conduct industrial relations. On the other hand, unions refused to forego the use of economic power as the ultimate determinant of issues even in wartime. Both these attitudes constituted failures of voluntarism as the foundation of industrial relations under emergency conditions. One of the few constructive results from the performances put on by the nonconformists was a highlighting of the voluntary nature of the acceptance of War Labor Board orders by the overwhelming majority of unions and managements.

THE COMPLIANCE PROBLEM

As indicated in the preceding discussion, voluntary acceptance of Board directives had to be relied upon as the only practical way of insuring compliance with them. An interweaving of mediation with voluntary arbitration was the formula used to eliminate compliance problems before they arose. But compliance problems couldn't be entirely

avoided. Some unions would inevitably break the no-strike pledge,³⁰ and some companies would certainly refuse to follow Board directives.

What action, if any, should be taken to enforce those determinations that were rejected? How could they be enforced without a loss of the irreplaceable voluntary aspects of the war program? What conditions of work should prevail when the government seized a plant in order to terminate a stoppage? These questions were not answered when they arose under the National Defense Mediation Board. They had to be faced squarely during the war.

Each refusal to go along with a Board directive was, as previously noted, a rejection of voluntary arbitration in wartime. One could say that the no-strike no-lockout pledge was thereby violated. But the action could not be construed as illegal no matter how recalcitrant it seemed to be.

It is basic to this discussion to note that crises over non-compliance did not arise as long as production was uninterrupted. If plant operations continued after rejection of an award, the War Labor Board renewed its efforts to bring about a meeting of minds between the parties or a willingness to accept a Board order. Compliance cases were mainly of this type. They came up principally in "small" cases. Most of the compliance cases were finally settled by finally getting the parties to acquiesce in the Board determination.³¹ Adoption of a noncooperative attitude

³⁰ Independent unions, not affiliated with either the A.F. of L. or the C.I.O., contended that they were not a party to the no-strike agreement and were not bound by it. A number of them also refused to acknowledge any obligation to "abide by War Labor Board orders" because labor representation on the agency was confined to the two national labor organizations.

³¹ A major part of the work of the War Labor Board's compliance division was in conducting meetings between the parties. They were urged to go along with the Board determination. Efforts were made to secure either voluntary acceptance of the Board order or an alternative answer acceptable to both parties. The War Labor Board held the view that, consistent with the law, the parties could agree at any time upon a modification of its

by either party created a public emergency only if a stoppage of production occurred. Something then had to be done by the Government in order that the work would be resumed.

Although the parties were legally free to reject an arbitration award of the War Labor Board, they had no license to use strikes or lockouts as usual in straightening out their private affairs. Exercise of those rights in wartime raised a question of more serious import than whether or not a Board decision would be effectuated. The issue created by an insistence upon the right to strike was not exclusively, or even primarily, a problem for the War Labor Board. It called for the use of the emergency powers of the President or action by the Congress. Private rights would have to give way in order to preserve the national security. Any decision bearing upon this crucial subject was quite beyond the powers of the War Labor Board.

Government seizure and operation of a strike-bound plant became standard first steps in bringing about a resumption of production.³² But that didn't provide any automatic solution to the problem. Workers still had to be convinced of their duty to go back to work "for the Government." There were times when employees decided to defer a return to work until provision was made for taking care of the underlying grievances that caused the trouble in the first place. This could mean an assurance that a War Labor Board order would be effectuated if the employer had rejected it.³³ It might entail getting employees to go along with a Board

directive orders. As a last step in the compliance procedure, the Board itself might hold a public hearing at which the parties were called upon to "show cause" why a directive should not be accepted by them. In a number of instances this resulted in a clearing up of all difficulties.

³² For the reasons that underlay use of such a procedure, see page 165.

³³ As in the case between Montgomery Ward and Company and United Mail Order, Warehouse, and Retail Employees Union of the United Retail, Wholesale and Department Store Employees of America, Local 20 (C.I.O.) (3 WL Reports 99). It is not to be inferred that a return to work was held off in this case until such an assurance was given.

order despite union opposition.³⁴ In other instances, a modification of the Board order to conform with the minimum demands of the employees might be sought.³⁵

Action taken by the Board constituted a determination of a dispute by that government agency that was best qualified to fix fair and equitable conditions of employment. Such determination might nevertheless not prevail if the essential ingredient of acceptability was lacking. Putting a board determination into effect in a particular case, such as in the bituminous coal disputes, would have called for more coercion than should or could be employed by that agency of government called upon to operate a facility. A considerable amount of mediation might be engaged in after plant seizure. A new kind of collective bargaining—between the government-operating agency and the representatives of the employees—could also be brought into being.

Procedures to be followed in seizing a plant and in deciding upon employment conditions to prevail during government operation of a seized facility were considerably clarified in June 1943 when the War Labor Disputes Act was passed by Congress. Up to that time, a stoppage of production was dealt with only under the emergency powers of the President. Now the legislative branch assumed a part of the burden of restricting private rights in the interest of the general welfare. It was impelled to do so by a coal crisis.

Representatives of the United Mine Workers refrained from participating in War Labor Board consideration of the 1943 coal case. A directive order to settle the dispute was issued by the Board on May 14, 1943. It was not ac-

³⁴ This was the course followed, for example, in the case between California Metal Trades Association, San Francisco Machine Shop Division and International Association of Machinists, Lodge 68 (A.F. of L.) (17 WL Reports 669). The union had refused to follow a Board order directing a removal of a ban on overtime and the operating agency sought to effectuate this order.

³⁵ An example is in the Memorandum Agreement between the Secretary of Interior and United Mine Workers of America concerning Operation of Bituminous Coal Mines (12 WL Reports 64).

cepted by the union and the mines were struck. Action by Congress was widely demanded and the War Labor Disputes Act was passed.

Congress formally approved, in general, the plant-seizure policies previously followed by the President.³⁶ As respects conditions of work in seized facilities, it was provided³⁷ that a "plant, mine or facility, while so possessed, shall be operated under the terms and conditions of employment which were in effect at the time possession of such plant, mine or facility was so taken." An orderly method for affecting changes in those conditions was also specified. Representatives of a majority of all employees or the government-operating agency could "apply" to the National War Labor Board for a "change in wages or other terms or conditions of employment."³⁸

Under the War Labor Disputes Act, so-called directive orders of the War Labor Board might not be effectuated by the government if they were rejected by one of the parties to the dispute and if a strike then ensued. A procedure was set up by Congress under which the terms of such orders could be modified. Failure to go along with an original Board order could, nevertheless, be highly disadvantageous to both sides. Workers would be called upon to return to

³⁶ In Section 3 of the War Labor Disputes Act. Government seizure and operation of a plant was sanctioned by Congress to prevent interference with "the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful therewith." The extent of the government's seizure power under the Act became important in the Montgomery Ward case when the company's mail order and retail establishment was taken over. The company contended that a shut-down of its operations would have no effect upon the war effort and the government lacked authority to seize the plant. A threatening aspect of the case, however, was the possibility of a spread of the strike to nearby manufacturing plants that were geared directly to the war effort. The epidemic possibilities inherent in every work-stoppage made practically every strike an unwarranted risk in time of war.

³⁷ By Section 4 of the Act.

³⁸ By Section 5 of the War Labor Disputes Act. An approval by the War Labor Board of a request for changes in conditions of employment was then subject to approval of the President. After that, the conditions approved by the Board had to be effectuated by the operating agency.

work under disputed conditions of employment. Management might be excluded from subsequent procedures available for settling employee claims. On balance, the greatest risks from seizure were borne by management. Sanctions could operate against them but there was still no way to compel employees to get back on the job if they were dissatisfied with the terms of employment.

The War Labor Disputes Act did make it unlawful for any person to call a strike or to assist in the conduct of a strike against a government-operated plant. Banning strikes against the government was a new device. The restriction was actually not as sweeping as might appear on the surface. No individual employee would engage in an unlawful act "by reason only of his having ceased work or having refused to continue to work or to accept employment." Distinguishing between a concerted refusal to work and a unanimity of individual decisions not to go back on the job was soon found to be a difficult proposition.

Union officials could not legally interfere with the return of employees to work in a seized plant but individual employees might lawfully refuse to go back. The workers could even be unanimous in their individual opinions. Bituminous coal miners were, at least technically, unanimous in their decision to stay off the job during the 1944 coal dispute. Operations could not be resumed under previously existing conditions of work, as contemplated by the War Labor Disputes Act, even though the mines were in possession of the government and were being operated by the government.

In the face of this kind of an impasse, the operating agency had to propose new conditions of employment in an effort to create a willingness of employees to work. In the case of the coal miners, the necessary change of employee opinion could be affected only if one particular condition prevailed—if there was an agreement subscribed to by their union. The unwritten law of "no contract, no work" had to

be complied with. Under these conditions, the operating agency was impelled to consummate an agreement with the union as the only way of getting a resumption of operations.

Certain restrictions were placed upon the exercise of the right to strike by the War Labor Disputes Act. As just noted, individual employees were not required to work against their wills even though strikes against government-operated plants were made illegal. There was an additional restriction upon the right to strike. Unions were required to give notice³⁹ of a threatened work-stoppage in any plant operated by a "war contractor." Uninterrupted production was required in such plants for thirty days following the filing of such notice. During the thirty-day "cooling off" period, the National Labor Relations Board was required to take a secret ballot to determine whether or not the employees "will permit any such interruption of war production." This attempt at inhibiting strikes calls for some comment.

Making government facilities available to permit employees with a grievance to vote for or against striking was among the more quixotic of the wartime policies. Some Congressmen apparently held the view that strikes in wartime could only possibly arise as a result of the machinations of union leaders. They reasoned that if the employees could only express their real wishes in a secret ballot the threat of strikes would disappear. Conniving union leaders would be put in their proper place.

If the reasoning were correct, the risk of strikes could be eliminated in a simple way without any Congressional action restricting the right to strike. The reasoning was not correct. Most workers truly wanted to avoid strikes in wartime. But they didn't want to work at conditions that seemed to be grossly inequitable. And, of course, the great majority of strikes that took place during the war were

³⁹ To the Secretary of Labor, the National Labor Relations Board, and the National War Labor Board.

initiated by the employees themselves often over the strenuous opposition of their union leaders. The strike-vote procedure provided by the War Labor Disputes Act served as a new device to use in the never-ending struggle of employees for better conditions of employment.

Employees knew full well that a vote against striking would vastly increase the difficulties faced by their negotiators in getting the employer to "grant" a substantial part of any "demands" under discussion. Their bargaining position would be adversely affected by a vote expressing a determination not to strike under any conditions. Notice would thereby be given to management that every union demand could be rejected with safety. When employees were given an opportunity to cast secret ballots about the use of strikes in wartime, they ostensibly voted to authorize work-stoppages. In practically all these instances, the vote to strike was actually cast to strengthen the union's bargaining position. It was, in most instances, no expression of a willingness to strike at all. Prosecution of the war would surely have been impeded if strikes had taken place in every instance where a majority of the workers voted "yes" on the secret strike ballot.

Some of the elementary facts of life about industrial relations, made eminently clear from that experience, have yet to be generally understood. Interest still runs high in the conduct of secret polls by the government to find out the true sentiment of the employees. An employee vote, many still believe, could be taken as respects the acceptability of terms of employment offered by management in collective bargaining. There is a disposition to believe that union representatives do not express the real desires of the employees.⁴⁰ In some cases, union positions doubtless do not

⁴⁰ Employee balloting on various issues in dispute was provided for in a number of the acts passed by state legislatures in 1947 as well as, under certain conditions, in the Taft-Hartley Act passed by Congress in the same year.

reflect the will of a majority of the members. In most instances they unquestionably do.

Any voting procedure designed to show a difference of opinion between a union and its members lends itself to use as a tactical device to augment bargaining strength. For example, turning down the best offer made by management in collective bargaining may be simply a new way of "jacking up" the price of settlement. Why shouldn't employees reject the employer's best offer in a case where such rejection involves a minimum risk of getting less and a fair chance of getting more? It is not likely that tactical considerations can ever be substantially removed from voting procedures of the kinds under discussion.

One further aspect of the strike-vote procedure set up under the War Labor Disputes Act should be referred to. The duty of the National Labor Relations Board to take strike votes carried an unavoidable implication that employees retained the right to strike in wartime. Many workers were surprised to note that they could actually secure government approval of their exercise of that right merely by conforming to certain required procedural steps.⁴¹

After passage of the War Labor Disputes Act, the no-strike agreement of labor hung precariously in the balance. A number of incongruities had to be cleared up. All over the country, workers wanted to know whether or not the national policy for settling labor disputes in wartime rested upon the voluntary no-strike agreement or upon the Congressional policy of cooling off and then striking.

Firm steps to maintain the no-strike policy were taken by the War Labor Board. Labor and management representa-

⁴¹ The War Labor Disputes Act was not explicit about the interpretation to be placed on a "yes" vote. It merely provided that "the National Labor Relations Board shall by order forthwith certify the results of such balloting, and such results shall be open to public inspection." The War Labor Board insisted that the vote was solely to determine desires and gave no right to strike. It was not easy to answer the puzzled inquiry: "What was the vote all about?"

tives joined with the public members in unanimously insisting that the voluntary commitments taken and given in the no-strike no-lockout agreement had to be carried out, irrespective of any policy laid down by Congress. Agreements voluntarily made have to be carried out. This was made the main argument. It finally prevailed but only because of the vigorous position taken by a tripartite board.

As respects effectuation of its orders, which is the main subject under discussion here, the War Labor Board considered that to be a "compliance" matter and not an "enforcement" problem. The choice made as between these two terms is most revealing of the basic philosophy underlying the Board program. Efforts to secure labor and management acceptance of an order, or to bring about an agreement between the parties upon alternative terms of employment, continued long after a board determination was rejected by one side or the other. Voluntarism typified the work of the War Labor Board from the beginning to the end of its procedures.

The formula of voluntarism was modified only if a work-stoppage actually occurred. Issues then raised were far beyond the jurisdiction of the War Labor Board. Whether private rights should be modified in the public interest then became the problem. This one could only be dealt with by the legislative and executive branches of the government. Both branches grappled with the problem. In spite of all the stresses and strains of World War II, no attempt was made by the government to require individual employees to work against their will.

Even when limitations were placed upon the exercise of the right to strike, by the War Labor Disputes Act, a so-called cooling-off period was the main restriction. The no-strike no-lockout agreement, voluntarily entered into by labor and management, restricted the private rights of these parties to an extent far beyond anything that was done by

Executive Order or Congressional action. More than anything else, that testifies to the efficacy of a wartime policy based upon voluntarism.

THE WAGE-STABILIZATION PROGRAM

When first established, the National War Labor Board had one function—the settlement of labor disputes. For reasons previously expressed, the voluntary acceptance of Board jurisdiction and of Board determinations in particular dispute cases was an essential part of the wartime labor program. Instead of relying upon relative economic power to be the final arbitrament in disputes, labor and management by and large agreed to accept the majority judgment of a tripartite board.

To permit a decision “on the merits” of a particular case, the War Labor Board was given the widest kind of latitude in deciding upon appropriate terms of employment. Serving as a substitute for a strike, the War Labor Board authority to direct was as broad as the power of labor and management to agree. Acceptance of the Board’s judgment, as determined by a majority vote, was the *quid pro quo* for an unqualified no-strike no-lockout agreement.⁴²

A clear-cut, though somewhat complex, national policy for settling labor disputes in wartime was thus created. The necessities of fighting the war blurred the outlines of that policy almost before it had gotten well under way. Wage stabilization was the discordant note. Government direction of labor and management was emphasized in this phase of labor relations. This was in marked contrast to the cooperative approach epitomized by the War Labor Board.

⁴² In accordance with this idea, the War Labor Board was made an independent agency within the Office of Emergency Management. It was not set up as a part of the Department of Labor because management and labor representatives on the Board could not be made subject to direction. They sat on the Board to be vigorous advocates and, in this particular at least, they were no disappointment.

Reconciliation of these two fundamentally different policies was the most exacting of all the problems encountered by the Board.

A mounting inflationary spiral caused widespread concern right from the start of the war. Before many months elapsed, a national wage-stabilization policy was incorporated in an Act of Congress.⁴³ From then on, decisions in wage disputes did not represent solely the independent judgment of the War Labor Board but depended, to an increasing extent, upon wage regulations promulgated elsewhere. From then on, there were persistent questions about whether, by inaugurating a wage-stabilization program, the government had modified or scrapped the no-strike agreement.

There could be little doubt of the need for an economic policy to keep inflationary forces in check. Organized labor cooperated with the efforts of the War Labor Board to take this factor into account when decisions in wage dispute cases were made. On the other hand, many labor leaders insisted that the no-strike no-lockout agreement was violated by the government whenever decisions in wage cases were directed, in any degree, by some other governmental agency. The no-strike policy was dependent upon the ability of a tripartite board to exercise its independent judgment. Stabilizing wages without unstabilizing industrial relations had to be accomplished if the wartime economy was to be kept on a reasonably even keel.

A major responsibility for developing any wage-stabilization program had to be assigned to the War Labor Board as the best way to insure that the no-strike agreement would be adequately protected and kept intact. Wage stabilization was added to the disputes-settling function of the Board. The manner in which this was done, as well as the crises that arose in consequence, makes up a major part of the history of industrial relations in World War II. A detailed consideration is in order.

⁴³ Reference is to the Economic Stabilization Act of October 2, 1942.

The Seven Point Program

During the first few months of its existence, the attention of the War Labor Board was focused almost exclusively upon the union-security issue. By comparison, any wage problems seemed to be of very secondary importance. Union security involved "basic principles"; wage disputes, it was believed, could always be worked out by "give and take." Before the union-security question was finally resolved, however, the duty of the Board to decide wage cases so as not to add to the growing inflationary threat loomed as a responsibility of the first magnitude.

The nature of the Board's duty in wage cases was first spelled out by President Roosevelt on April 27, 1942, when the so-called Seven Point Program was announced. Various groups were called upon by the President to cooperate voluntarily in avoiding policies that would bring about a disastrous race between wages and prices. The War Labor Board was instructed to stabilize the wage-rate structure of the country by greatly restricting the extent of the wage increases ordered in dispute cases.

With the issuance of the Seven Point Program, the duties of all members, but especially of the public members, on the War Labor Board were extended. Instead of seeking a meeting of minds under any terms agreeable to labor and management, the Board had to be critical of the terms of settlement themselves. A limitation of the area within which agreement might be effected was the principal result of the Seven Point Program. Wage policies promulgated by the War Labor Board at this stage of the stabilization program were in the nature of self-imposed restrictions upon the exercise of its judgment in deciding dispute cases. The Board evidenced a ready willingness to work out such self-imposed restrictions.

The so-called Little Steel formula came into being on July 16, 1942. It was announced by the Board as a restriction upon general wage increases required to effectuate the

President's Seven Point Program.⁴⁴ Full discretion to modify or to abandon the Little Steel formula at any time was retained by the War Labor Board. It was made quite clear, moreover, that a continued adherence to this wage policy depended in no small measure upon the success of other agencies of the government in stabilizing those prices which affected the cost-of-living. Development of the Little Steel formula was, incidentally, an outstanding example of the way general principles were derived through a case-by-case approach.⁴⁵

Inadequacies of the safeguards being thrown up against wage-rate inflation soon became all too apparent. Limitations had been placed only upon those wage increases that were ordered by the War Labor Board in dispute cases. Wage increases in the absence of a dispute were subject to no limitations at all. Greater wage increases could be made available to employees through negotiated agreements or by voluntary unilateral action of employers whose workers were not organized. Ordinarily, this duality of treatment would have created no important problem. Employers don't usually offer large wage increases. With the increasing tempo of war production, however, powerful economic forces began to push wages steadily upward in the uncontrolled areas. A race between wages and prices seemed to be imminent.

⁴⁴ The Little Steel formula brought just one particular kind of wage movement under control. That was the upward movement of the general wage level, in the form of general or across-the-board increases, in response to increases in the cost-of-living. From the beginning of the war emergency, January 1, 1941, cost-of-living had risen by 15% according to the B.L.S. index. Under the Little Steel formula, general wage increases, made because of cost-of-living changes, would be limited to a total 15% increase in wage rates since January 1, 1941.

⁴⁵ The case was "in the matter of" Bethlehem Steel Corporation, Republic Steel Corporation, Youngstown Sheet and Tube Co., Inland Steel Co., and United Steelworkers of America (C.I.O.), formerly known as Steel Workers Organizing Committee (C.I.O.) (1 WL Reports 325). This was the first case before the War Labor Board in which a general industry-wide wage increase was sought to compensate for changes in the cost-of-living. A principle was evolved to cover that kind of problem. Mention may be made of the fact that the four companies were known in industry as the "Little Steel" companies; the United States Steel Corporation being known as "Big Steel."

Adequate control of inflationary forces required all-inclusive restrictions upon even those wage increases that employers were willing or anxious to make. It was indeed a novel situation when the government had to become concerned about the propensity of management to pay voluntarily higher wages than were good for the country. There was, nevertheless, a stark reality about the concern. One of the most critical problems about running a plant in wartime was getting a full complement of workers. Bidding up labor rates was a natural course for management to pursue when employees were hard to get and when most concerns had an ample "ability to pay" substantial wage increases. The government paid the bill. Attempts of one company to solve its manpower problem by a wage boost, which it was able to pay immediately, forced other companies in the same labor market to increase their wages, in order to hold their workers, even though they lacked ability to pay. In many instances prices were greatly increased. As a result, wages were increased without any constructive assistance to solution of the manpower problem.

A number of additional considerations made a comprehensive wage stabilization program necessary. Only then would the same standards of equity apply equally in dispute cases and negotiated adjustments. Unless this were done, labor turnover could increase so greatly as to affect war production adversely. And, of course, bidding up labor rates in a disorderly and vain attempt to solve a manpower shortage would not only increase prices but also the government's cost of running the war. Government control over all wage changes soon appeared as a necessary part of mobilization for war.

A Congressional Stabilization Program

The country was about to go into another unique experiment. Congress concluded that all wages had to be brought under control as part of a comprehensive effort to stabilize prices and the cost-of-living. To carry out this intent, the

Economic Stabilization Act was passed on October 2, 1942. The President issued Executive Order No. 9250 on the following day in order to meet his responsibilities under the Act. By the terms of this Executive Order, the National War Labor Board was given the responsibility for developing and administering a wage-stabilization program in conformance with the terms of the new law.⁴⁶

The new regulations provided that: "no increase in wage-rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration or otherwise, and no decreases in wage-rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases." No wage change could legally be made by any employer, therefore, without War Labor Board approval. Severe penalties were available to support enforcement of the law.⁴⁷

A wage-stabilization program and not a "wage freeze" was inaugurated. The great variety of reasons that could be used as bases for approving wage increases even seemed to be at variance with the stated objective of wage stabilization. These reasons were outlined in the Executive Order as

⁴⁶ The Executive Order also provided for the inauguration of new price and salary controls. It further created the Office of Economic Stabilization with power to issue directives to all government agencies, including the War Labor Board, to any extent necessary to achieve the stabilization objectives of the Act of Congress.

⁴⁷ The Economic Stabilization Act provided, in Section 5, that "The President shall also prescribe the extent to which any wage or salary payment made in contravention . . . shall be disregarded by the executive department and other governmental agencies in determining the costs and expenses of any employer for the purposes of any law or regulation." In Executive Order No. 9250 the President ordered that any illegal wage "shall be disregarded by the Executive Department and other governmental agencies in determining the costs of expenses of any employer for the purpose of any law or regulation including the Emergency Price Control Act of 1942 . . . or for the purpose of calculating deductions under the Revenue Laws of the United States or for the purpose of determining costs or expenses under any contract made by or on behalf of the Government of the United States."

follows: "The National War Labor Board shall not approve any increases in the wage-rates prevailing on September 15, 1942, unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards-of-living, to correct gross inequities, or to aid in the effective prosecution of the war." To approve wage increases in each of the mentioned categories while still maintaining the general wage levels existing on September 15, 1942, as specifically required by the Stabilization Act, was quite a challenge. Under the order, the door to wage increases was first slammed shut with a bang and then it was thrown widely open again. The War Labor Board was evidently expected to devise some way of pushing the door back to a slightly ajar position.

As a preliminary to embarking upon its onerous wage-stabilization activities, the Board had to decide just what wage increases could be allowed in each of the various categories of permissible adjustments without changing the general level of wages that existed on September 15, 1942. Congress and the President outlined the general objectives and the War Labor Board was expected to work out a detailed policy under which these objectives could be attained. None but highly limited wage adjustments could be made in each of the several categories of permissible increases if the general level of wages was to be stabilized.

Combining a duty to work out the wage-stabilization program with a responsibility for settling all labor disputes brought anomalous functions together in the War Labor Board. Compelling reasons supported the combination. Working out wage-stabilization principles to effectuate the Seven Point Program had already given the Board an experience in dealing with the problem at hand that was not duplicated in any other government agency. One other reason was most cogent. Wage stabilization couldn't mean one rule for dispute cases and another for the so-called volunteers. The same agency had to handle both if there was to

be uniformity of treatment. That agency had to be the War Labor Board because its continuance was required by terms of the no-strike no-lockout agreement.

Although there was no practical alternative to the assignment of wage-stabilization responsibilities to the War Labor Board, the results were disadvantageous in a number of particulars. An overwhelming administrative job had to be assumed by an arbitration board that was peculiarly adapted to the making of value judgments and the reconciliation of conflicts by compromise. Twenty or more voluntary applications for approval of wage increases were to be handled for every dispute certified to the Board. Such a flood of voluntary applications couldn't possibly be given individual tripartite discussion. They would have to be processed in a routine manner by administrative officers.⁴⁸

Wage policy statements and general regulations to be used in handling the voluntary applications had to be worked out in advance by the Board for the guidance of its administrative officers. No case-by-case approach was possible if the demands of wage stabilization were to be met. Administrative rules became more numerous and more detailed as the load of "voluntaries" increased. The deliberative board was never quite happy with its heavy administrative responsibilities. And it grew progressively more and more restive about the limitations imposed by the wage-stabilization program upon the settlement of labor disputes.

Mediation in voluntary arbitration was hampered to a marked degree by the removal of a large element of "give and

⁴⁸ From October 3, 1942, until August 18, 1945, board records disclose that a total of 453,373 requests for approval of proposed wage increases were filed. This compares with 20,692 dispute cases certified to the Board from January 12, 1942, until August 18, 1945. When the War Labor Board was given wage-stabilization responsibilities, its regular staff totaled less than 200 employees. A rapid staff expansion and the setting up of Regional Boards became immediately necessary. The peak in number of employees was reached in 1945 when the Board had 2613 full-time employees, 1162 part-time or *per diem* employees, and 618 persons who served without compensation.

take" over wages, which is implicit in collective bargaining, mediation, and voluntary arbitration. Wages were no longer determined as a matter of judgment or by a "feel of the situation." The acceptability factor became virtually non-existent in wage cases. Wage determinations had to conform to the rules whether the parties liked the results or not.

Sweeping changes in previous concepts about wage determination in dispute cases came in with economic stabilization. President Roosevelt stated the reasons for these changes. In a message sent by him to Congress in September 1942, just prior to the passage of the Economic Stabilization Act, he stated: "in war times and particularly in times of greatly increasing prices, the government itself has a very vital interest in seeing to it that wages are kept in balance with the rest of the economy . . . Owing to the fact that costs of production are now, in so many cases, being passed on to the government, and that so large a percentage of profits would be taken away by taxation, collective bargaining has changed a great deal from what it was in peacetime. In times of danger to our economy, the government itself must step into the situation to see to it that the processes of collective bargaining and arbitration and conciliation are not permitted to break up the balances between the different economic factors in our system." In other words, the public interest in collective bargaining required not only a peaceful settlement of all disputes but also a limitation upon the kind of wage terms that could be agreed to by labor and management.

Collective bargaining and the discretion of negotiators were deliberately restricted by the government as a war measure. Substantive issues were decided by the government. The qualifications on wage changes would obviously have to be recognized by the War Labor Board since the stabilization program set up by the Congress was binding upon all. There could be no doubt on this score. The

really serious question was whether the Congressional limitation upon the judgment of the War Labor Board constituted a scrapping by government of the no-strike no-lockout agreement. Was the price of wage stabilization to be an unstabilization of industrial relations? ⁴⁹

The part of Executive Order No. 9250 that caused greatest concern, particularly to those who were aware of the manner in which the War Labor Board had been built up on a voluntary basis, was the section granting the Director of Economic Stabilization authority to issue policy directives. In this connection, an immediate issue was drawn.

The order particularly specified "that where the National War Labor Board or the Price Administrator shall have reason to believe that a proposed wage increase will require a change in the price ceiling of the commodity or service involved, such proposed increase, if approved by the National War Labor Board, shall become effective only if also approved by the Director." Final decisions in certain wage disputes were thus to be made by the Director of Economic Stabilization and not by the War Labor Board. In addition, policy directives of the Director could be issued at any time to supersede the tripartite judgment of the Board that was the *quid pro quo* for the no-strike agreement.

Organized labor feared that wage-stabilization necessities could easily result in divesting the Board of all discretionary power over wages. It might even become an administrative agency responsible for carrying out a wage program evolved solely by the Director. Labor representatives on the Board were willing to assume a responsibility for getting employees to go along with decisions which they helped to formulate

⁴⁹ Some labor leaders, fully aware of the need for economic stabilization, held the conviction that labor would be fully justified in seeking a new policy for settling disputes on the ground that the government "violated" the pact establishing the War Labor Board when it inaugurated the wage-stabilization program. They also realized that no better substitute for the War Labor Board would be found if the issue was drawn. Under these circumstances, labor members did not withdraw from the War Labor Board, but some of them insisted that the government failed to carry out its part of the no-strike bargain.

on the tripartite board. They refused to guarantee support of decisions made by an individual government officer. The very notion that one person might make final wage decisions was vigorously opposed by the unions as being wholly contrary to the cooperative undertaking that was being successfully worked out.

The argument came to a head over the right of the Director of Economic Stabilization to reverse a wage determination of the Board solely on the ground of possible price consequences. As the Executive Order stood, board action in these cases was no longer a final determination of the labor dispute. A board directive could be vetoed even though it fairly weighed the equities in a case and despite the fact that it was made in full conformance with the wage-stabilization policy.

Besides the fundamental principle involved, a number of practical problems incident to efficient plant operation were created. Under the rule in question, the wage-stabilization policy would not necessarily be applied uniformly to all employees. Revocation of a wage adjustment, otherwise permissible under stabilization rules, because of price consequences, would entail continued payment of inequitable wages to some employees in order to subsidize the price of a commodity.

No voluntary arbitration board could long exist under rules which, by their very nature, contemplated discriminatory treatment of some wage earners. Granting a wage increase to employees in a plant on one side of the street while denying it on the other side, solely because of variations in the anticipated effect upon price, would surely lead at least to impaired morale and almost certainly to work-stoppages.

The veto power of the Director of Economic Stabilization over wage determinations made by the board loomed as a serious threat to the continuance of the tripartite board.⁵⁰

⁵⁰ The veto power was accorded to the Director partly because of a fear that the tripartite Board could not properly administer the wage-stabilization program. Public members might be outvoted by labor and industry. There was some reason for labor and industry members to join in support

That obstacle was quickly removed in conferences between the Board and the Director of Economic Stabilization.⁵¹ Any problem relative to the effect on prices of a particular wage decision was to be discussed with a view to developing a mutually acceptable general policy. Board decisions in particular cases would not be overturned. With this understanding, the War Labor Board was ready and willing to grapple with the wage-stabilization problem.

The agency that had been established to arbitrate labor disputes immediately directed its efforts to the promulgation of a general wage policy. It was authorized "to issue such rules and regulations as may be necessary for the speedy determination of the propriety of any wage increases or decreases in accordance with this order."⁵² Within exceedingly broad limits, fixed by law and by the Executive Order, the War Labor Board sought to define those wage increases that would contribute to an equitable wage structure for the United States without changing the existing general wage level. Only those wages that were most out-of-line could be corrected. Laggard rates could be brought up to prevailing levels. Such a policy, and only such a policy, could effectuate the intent of Congress. It was up to the Board to spell out the policy.⁵³

Looking upon a voluntary wage increase as too great, and

of voluntary applications for approval of proposed wage increases. Management was often as anxious as labor to get such approval as a means of solving manpower problems. In the actual work of the Board, the out-voting of the public members did not materialize. In only a very few cases were the public members in the minority. Industry members on the Board earned high praise for joining with the public members to disapprove many an application made by an employer for a wage increase that would have had unstabilizing effects.

⁵¹ The first director was James F. Byrnes.

⁵² Reference is to Executive Order No. 9250.

⁵³ Mention should be made in this connection of the place of the Little Steel formula in wage stabilization. This formula was an important control but only a small part of a complete wage-stabilization program. The Little Steel formula was related to general wage movements developing in response to changes in cost-of-living. There were other wage movements that also had to be brought under control. Inter-plant and intra-plant wage relationships were most important in this regard.

even as anti-social, was something new for the United States. A program to keep down wages, despite all the upward pressures of powerful economic forces that existed during the war, could easily have been more honored in the breach than in observance. Experience soon showed that employers who wanted to give wage increases could think up very ingenious ways of doing so without violating any rules. Promotions might be accelerated. Reclassification of employees into higher job ratings could become "urgently necessary." Other and more indirect methods were also available. If even relative success was to come from wage-stabilization efforts, labor and management had to be convinced of the soundness of the program. Their needs could not be disregarded while the fight against inflation was conducted. Voluntary acceptance of labor and management was every bit as important to wage stabilization as it was in the work of settling labor disputes. For the combined task, the tripartite composition of the War Labor Board was more essential than ever.

A definition of the wages-line to be held was made by the War Labor Board in its momentous policy statement of November 6, 1942. This statement was, in many ways, the greatest achievement of the War Labor Board. It had the unanimous support of labor, management and public representatives. Labor and management representatives thereby indicated their willingness to accept a rigid wage-stabilization program and to incorporate such a program into the system of voluntary arbitration that had been set up. A major supporting pillar of the entire economic-stabilization program was thereby erected by the tripartite War Labor Board. Voluntarism was the basis of both wage stabilization and disputes settlement. Self-regulation would be the keynote for working out these related problems.

Cooperation of labor and management with the government in the wage-stabilization endeavor was made possible by one condition. The War Labor Board retained a wide

latitude in changing wage-stabilization rules. The wage policy of November 6, 1942, was neither rigid nor inflexible. Any part of it could be revised by the Board at any time, within the very broad limits of Executive Order No. 9250, by a majority vote of its members. A wide variety of wage increases were specifically authorized and, in allowing adjustments in each category, the Board was committed to maintain the general level of wages existing on September 15, 1942, only "so far as practical." Economic conditions or the effective prosecution of the war might necessitate a boost in the wage level. If the Board thought such a change was desirable, it had the full power to authorize more liberal wage adjustments.

Under Executive Order No. 9250, the War Labor Board was designated as the custodian of the entire wage-stabilization policy. One illustration will clarify the significance of this arrangement. In the November 6 policy statement, the Board considered the word "maladjustments," as used in Executive Order No. 9250, as a reference to general wage increases approvable as an offset to rises in the cost-of-living.⁵⁴ Use of the maladjustment criterion was limited by the Board, in both dispute and in voluntary cases, to wage adjustments allowable under the Little Steel formula. Any other formula might have been selected but the action taken seemed best to effectuate the stabilization program. Nevertheless, the Board possessed the power to modify the Little Steel formula at any time if the cost-of-living was not reasonably stabilized.⁵⁵ Other details of the wage-stabilization

⁵⁴ The word "maladjustments" had previously been so used by the Board in connection with the Little Steel formula.

⁵⁵ At various times the Board re-examined its November 6 policy with particular reference to the rising cost-of-living that eluded control efforts. On March 16, 1943, the A F. of L. members presented a formal petition to the War Labor Board asking that a modification of the Little Steel formula be made because of the mounting cost-of-living. A majority of the Board, consisting of the public and industry members, denied the petition on the ground that an adjustment was not necessary at that time to provide equity to the employees. The public members pointed out, however, that a continued rise in the cost-of-living might later necessitate a change in this wage policy.

policy of November 6, 1942, were similarly subject to modification by the Board.

As initially undertaken, then, wage stabilization was the primary obligation of the War Labor Board. In protest of wage-stabilization requirements, either labor or management could withdraw from the Board and force a change at least in the administration of the wage-stabilization program. Assignment of wage-stabilization responsibilities to the Board had the advantage of insuring a flexible program and one that would be administered with a regard to industrial-relations necessities as well as to minimizing the threat of inflation. These arrangements were tentative. Latitude retained by the Board might be circumscribed at any time and without any notice either by the President or by the Director of Economic Stabilization.

The "Hold the Line" Order

From October 3, 1942 until April 8, 1943, the wage-stabilization policy as just described was in full force and effect. The President's "hold the line" order, Executive Order No. 9328, then fell upon the War Labor Board without warning. Suddenly, on April 8, the Board was confronted with the loss of virtually all discretion in the general field of wage stabilization and also in respect to the settlement of wage disputes.⁵⁶

In a statement issued with the "hold the line" order, the President said: "Some groups have been urging increased prices for farmers on the ground that wage earners have unduly profited. Other groups have been urging increased wages on the ground that farmers have unduly profited. A continuance of this conflict will not only cause inflation but will breed disunity at a time when unity is essential . . .

⁵⁶ A steady rise in cost-of-living was causing widespread concern. The situation was made doubly serious by demands for higher farm prices during the Spring of 1943. On April 2, 1942, the President vetoed the Bankhead Bill which would have increased the prices of certain farm products. Shortly thereafter the "hold the line" order was issued in the form of Executive Order No. 9328.

inflation has been slowed up. Now we must stop it." The President had come to the conclusion that drastic steps to control inflation were all-important and had to be taken even at the risk of engendering greater difficulties in the stabilization of industrial relations.

Wage stabilization was transformed into a virtual wage freeze. The National War Labor Board was directed to authorize no further increases in wages or salaries except in two categories: (1) those "clearly necessary to correct substandards-of-living," and (2) those permissible "in accordance with the Little Steel formula as theretofore defined by the National War Labor Board . . ." By this time, practically all the adjustments allowable under the Little Steel formula had been made. The effect of the order, therefore, was to keep all wages just as they were except when adjustments were found necessary to eliminate substandards-of-living.

Under the new order, wage disputes could no longer be arbitrated. An impartial evaluation of the equities and merits in a case would have no bearing upon whether or not a wage increase was justified. In addition, wage stabilization would become rigid and inflexible. For example, the Little Steel formula would no longer be subject to modification by the Board, irrespective of any increases that might occur in the cost-of-living. Many labor representatives insisted with increased vigor that, with the issuance of Executive Order No. 9328, the no-strike no-lockout agreement was no longer a binding commitment upon them. This time they really meant it.

Besides reviving the issue about the status of the no-strike pledge, the "hold the line" order created numerous operating problems that were extremely serious both for labor and management. One important type of wage adjustment was to be entirely eliminated. This was the correction of so-called inter-plant wage inequalities, which had accounted for the bulk of the wage orders and approvals of the past year. Freezing all existing wage-rate relationships between plants was unanimously considered by the labor, management, and

public members of the Board to be impractical and highly undesirable. They knew that such a policy would not only create labor disturbances but would make it impossible adequately to man a number of industries and plants making essential war products.

Wage increases to adjust inter-plant relationships were made in response to wage movements quite separate and distinct from Little Steel adjustments made to stabilize the general level of wages in relation to cost-of-living. Even after a cost-of-living increase, wages paid by some companies remained far out of line with what was being paid generally by other concerns in the same labor market area or in the same industry. This was because some employers had previously paid relatively very low wages, often out of sheer necessity, as the only way of keeping their plants in operation. Now they could pay at or near the going rate for their area because business was profitable. Many of them wanted to do so as a matter of dealing fairly with their employees. Payment of the going rate in a labor market area was also necessary if the company was to secure a full complement of employees and to turn out a maximum amount of goods.

Inter-plant wage adjustments were quite essential to success of the government's own production program. No more inter-plant adjustments would mean that employees in certain war plants would be paid wages far below going rates in an area. Employers would thus be prevented from paying the same levels as other companies, even though that was essential to maintain production schedules. Winning the fight against inflation would be a sorry victory if production lines were seriously slowed down in consequence. The hold-the-line order, as originally issued, failed to give a proper regard to the necessities for achieving either stable industrial relations or maximum production.

Following a lengthy and a heated discussion, the War Labor Board unanimously concluded that it was not in the national interest to eliminate all wage adjustments made for

the purpose of changing inter-plant wage-rate relationships. This unanimous conviction was conveyed to the Director of Economic Stabilization. A joint effort was then made to find some principle by which adjustment of the most glaring inter-plant wage-rate inequalities could be approved without adding too greatly to inflationary pressures. On May 12, 1943, the Director of Economic Stabilization issued an order restoring to the Board its authority to approve or to direct wage increases necessary to adjust inequitable inter-plant wage relationships.⁵⁷

Other "clarifications" of Executive Order No. 9328 were made in order to give the Board sufficient latitude to carry out its assigned responsibilities. The Board's discretion was not restricted at all as respects either intra-plant wage adjustments to create a balanced wage rate structure or so-called fringe issues. Although the Little Steel formula was made an inflexible wage rule for certain types of cases, the War Labor Board concluded that enough latitude was given to enable it to function as a voluntary arbitration tribunal. Board custodianship of the wage-stabilization program was shared with the Director of Economic Stabilization and the Board was a junior partner.

"Fringe Adjustments"

Cooperation of labor and management in settling labor disputes through the War Labor Board, within the limita-

⁵⁷ The authority was limited. Inter-plant wage adjustments could be approved or ordered only in accordance with a prescribed formula rather than as a matter of judgment as to the merits of each case, which had previously been the practice. By the May 12, 1942 Directive, the War Labor Board was "authorized to establish as rapidly as possible, by occupational groups and labor market areas, the wage-rate brackets embracing all those various rates found to be sound and tested going rates. All the rates within these brackets are to be regarded as stabilized rates not subject to change save as permitted by the Little Steel formula. Except in rare and unusual cases in which the critical needs of war production require the setting of a wage at some point above the minimum of the going wage bracket, the minimum of the going rates within the brackets will be the point beyond which the adjustments . . . may not be made."

tions imposed by Executive Order No. 9328, was grounded upon patriotism and industrial statesmanship of the highest order. The support given by the labor leaders of America, almost without exception, to the wartime program of wage stabilization has never been adequately understood or fully recognized.

Practically all labor leaders stood staunchly by the no-strike no-lockout agreement despite the restrictions placed upon the powers of the War Labor Board. They often did so against insistent demands of their members for precipitate action. A number of them expended themselves in the process. It is not inferred that they believed a fair deal had been meted out under the wage-stabilization program. Their opposition to "imposed" regulations was bitter and never abated. Especially after the issuance of the hold-the-line order, a high guard was held by them to protect against any more directives that might further limit the discretion of the War Labor Board in wage matters.

Labor pressure for a relaxation of "arbitrary" wage controls mounted in intensity as the cost-of-living continued to rise. Demands for a "modification of the Little Steel formula" were loud and continuous. Every increase in living costs widened the gap in the controversy that developed. Labor pointed to higher prices as evidence for the need of relaxed wage regulations; other groups insisted that increases in the cost-of-living proved conclusively that more stringent wage controls had to be instituted.

Wage increases were blamed, usually quite erroneously, for every price increase and for every jump in the cost-of-living index. As a matter of high government policy, the attempt to keep prices in line was given precedence over trying to insure an equitable wage-rate structure. Wage increases ordered or approved to eliminate gross wage inequities, for example, could still be vetoed by the Director of Economic Stabilization solely on the ground that they would result in a price increase. It was this sort of regulation that

the labor unions denounced as "discriminatory and arbitrary."⁵⁸ But more regulations of this type were to come.

No further wage-policy directives were issued to the War Labor Board for almost two years. But on March 8, 1945, the Director of Economic Stabilization⁵⁹ sent instructions to the War Labor Board about the way cases involving so-called "fringe adjustments" were to be decided. Union demands for vacations with pay, shift differentials, paid holidays, reclassification and revaluation of jobs within a plant, and many other similar items were affected.⁶⁰ Most of these issues did not relate to changes in basic wage-rate schedules. They did increase total take-home pay of employees and some of them added to the labor costs.⁶¹

Fringe issues became exceedingly popular with the unions after other avenues for securing wage increases were blocked. Under Executive Order No. 9328, general wage increases to compensate for the upward movement in living costs were not available beyond allowances under the Little Steel formula. They were virtually exhausted. Wage increases to eliminate inter-plant differences were also strictly limited. Strong economic pressures for increasing wages persisted despite these restrictions. Employees looked to their unions to find a way out. In dispute cases, and in "voluntaries" as well, pressures for wage increases were diverted into the one

⁵⁸ The question was not primarily about the need for restrictions on wage increases. In its policy statement of November 6, 1942, the War Labor Board accepted the necessity for a wage-stabilization program. The issue was whether wage restrictions were to be specified by a tripartite board, charged with balancing the inflation problem against the need for stabilized industrial relations, or by an administrative agency that would give compelling consideration to economic-stabilization aspects regardless of any possible effect upon industrial relations.

⁵⁹ Fred M. Vinson had succeeded James F. Byrnes as Director of Economic Stabilization.

⁶⁰ The regulations applied also to Board actions on voluntary requests for approval of the various items

⁶¹ The adjustments in questions were termed "fringe" items because in normal times they are minor supplements to the basic wage issues and were taken up in negotiations after important wage issues had been disposed of.

likely channel that remained open—fringe adjustments and all kinds of indirect wage increases that didn't change basic schedules.

One of the heavy costs of the wage-stabilization program was the introduction of many fringe or collateral items into collective bargaining. Many a union demanded, and got, payment for time spent by employees in changing into working clothes, for example, although its members really wanted a direct increase in their wage-rates and even though the employer would have preferred to give the wage increase directly. Job evaluations and reclassification programs suddenly came into vogue not so much because of a devotion to balanced wage-rate structures, but because that was one open road to approvable wage increases.

The landslide of fringe issues, which came about to circumvent wage stabilization, indicated to many War Labor Board members that some modest relaxation in wage controls was overdue and might actually aid in the battle against inflation. It is a fact that two cents in the wage-rates is usually a more satisfying wage increase than three or four cents worth of fringe adjustments. The Director of Economic Stabilization determined, however, that more controls were needed. A hold-the-line order on fringe adjustments was promulgated. The old dilemma cropped up. Should additional administrative restrictions be imposed on fringe adjustments as an economic-stabilization measure even though the ability of the War Labor Board to arbitrate disputes would be further impaired?

Authority to decide fringe disputes resided in the War Labor Board only because of that part of Executive Order No. 9328 that permitted approval of "reasonable adjustment of wages and salaries in case of promotions, reclassifications, merit increases, incentive wages, or the like, provided that such adjustments do not increase the level of production costs appreciably or furnish the basis either to increase prices

or to resist otherwise justifiable reductions in prices.”⁶² Not until the latter part of 1944 was there any real concern about these various fringe adjustments. When they seemed to be developing into a flood tide, great concern was expressed that they might constitute a serious flank attack on the wage line.⁶³

In the instructions sent to the Board on March 8, 1945, the Director of Economic Stabilization “reinterpreted” Section 2 of Executive Order No. 9328. Limits were placed upon the fringe adjustments that the War Labor Board could approve or direct. Adjustments approvable for vacation allowances, shift differentials in noncontinuous operations, and reclassifications were spelled out in exact terms as “money limits.” As respects all other fringe issues, “non-basic wage-rate adjustments or changes in working conditions affecting earnings” could not be approved at all if they had any effect upon prices. Ability to pay was made the sole criterion of fairness and equity in such cases.

No matter how important those orders of the Director might have been for the control of inflation, they threatened to bring chaos to the program for securing peaceful and equitable settlements of all labor disputes. One example will illustrate the kind of problems that were in prospect. One company could be directed or authorized to pay a night-shift differential because it had a wide profit margin. The company “across the street” would not be permitted to make

⁶² The Director of Economic Stabilization informally ruled in May 1943 that “reclassifications” covered job-evaluation programs (intra-plant inequity cases) and that “or the like” covered most of the fringe issues. The “production cost” limitation applied only to government contracts. A technical application of the clause gave the Board greater latitude in deciding cases involving government contracts as compared with cases that did not. The possible effects of fringe adjustments on either the “level of production costs” or prices usually could not be computed in any satisfactory way.

⁶³ The matter was brought to a head by the Board’s decision of November 25, 1944, providing night-shift premiums in the basic steel industry where they had not formerly been paid and also requiring elimination of intra-plant inequities.

an identical wage adjustment because its operations were not so profitable. Yet, unprofitable operations might become more so if night-shift employees left for better jobs on which the differential was paid. Administrative rules and the use of "ability to pay" criteria were substituted for the exercise of judgment as a way of settling labor disputes. Although the move was widely hailed as a constructive step in the fight against inflation, the results appeared quite different to the various interests represented on the War Labor Board.

The Board unanimously held the view⁶⁴ that "it would be unstabilizing to fix inflexible money limits for general application in the case of wage-rate reclassifications, shift differentials, and vacations." Experience had shown that any announced fixed limit would tend to become the minimum as well as the maximum standard. In addition, industrial-relations situations vary so widely that all of them could not possibly be satisfactorily resolved by reference to a rigid formula. Instructions to decide fringe issues by reference to arbitrary money limits in certain specified types of cases, and in accordance with an ability to pay criterion in all others, introduced many new instabilities on the industrial-relations side of the picture. They did so without contributing to a more effective control of inflation. The instructions under discussion seemed to be, most of all, the product of an insistent demand to "do something" about fringe adjustments.

The no-strike no-lockout agreement was again placed in jeopardy and more critically so than in earlier crises. Doubts were expressed about the desirability of going through one industrial-relations crisis after another in order

⁶⁴ The Board position was enunciated in a document dated February 16, 1945, entitled "Statement of the Board's Past Practices Regarding Certain Wage Adjustments." Certain subsequent resolutions of the Board on the same subject were adopted on February 19, 1945, and were incorporated into a statement entitled "Resolutions of National Board with Respect to Job Reclassifications and Fringe Adjustments."

to stabilize wages in a rigid manner. Accumulation of a great body of experience about the nature of wage stabilization contributed to those doubts.

It was eminently clear that considerable flexibility was a basic requirement for any wage-stabilization program. Demand for labor was at an all-time peak and profitable plant operations were the rule. All employees wanted more wages and most employers desired to give them more by one means or another. Undue rigidity would surely induce evasions and violations—perhaps to an extent that would wreck the entire economic-stabilization program. The evidence on this point was in, and it was very convincing.

There could be no doubt that damming up a particular channel widely used to gain wage increases didn't dissipate the economic pressures for wage increases. It diverted them. New channels were then carved out. Fringe adjustments became important because of just such a diversion of pressures.⁶⁵ On the basis of that experience, the new instructions from the Director were viewed with considerable apprehension. Would strict government control of fringe adjustments now merely bring about another and unforeseen channel even less controllable than the old one? What new issues would become critical? Would the entire wage-stabilization program finally give way in a great surge of noncompliance?

In recognition of these cogent considerations, amended instructions for the handling of fringe adjustments were issued to the War Labor Board by the Director of Economic Stabilization on April 24, 1945.⁶⁶ It was ruled that the fixed money limits specified in earlier instructions were not controlling if, in the judgment of the War Labor Board, a different determination was necessary to stabilize area and industry practice. The "ability to pay" criterion would also not

⁶⁵ See page 191.

⁶⁶ By this time, William H. Davis had succeeded Fred M. Vinson as Director of Economic Stabilization.

be binding upon the Board if established area or industry practice was reinforced by some other basis of decision. In other words, a large measure of discretion was again given to the Board.

Meanwhile, a great deal of argument over fringe adjustments had been engaged in. This skirmish was actually only a minor part of a much bigger conflict that was raging over the basic premises of the wage-stabilization program. Organized labor wanted a modification of the Little Steel formula as the only way open to establish a new general level of wages. Before this issue was really resolved, the war came to a close and practically all restrictions on wage adjustments were lifted.

Wage Stabilization and Voluntary Arbitration

Various nonnegotiated regulations issued to stabilize wages have been referred to in some detail because they constituted the most formidable obstacles to the maintenance of that system of voluntary arbitration that had its origin in the no-strike no-lockout agreement. A fundamental issue was joined in the arguments over these regulations. Organized labor vigorously opposed the right of any officer of the government "arbitrarily to dictate" conditions of employment. A spirited defense was made of the principle of fixing employment terms even during the war under a system that called for the agreement or the assent of both labor and management. Whether or not wage stabilization in the public interest could be effected by adherence to the collective-bargaining tradition was at issue.

For the most part, the emergency war labor policy preserved a large measure of control over industrial relations in the hands of labor and management. Peacetime rights that couldn't be exercised in wartime were voluntarily relinquished and voluntary arbitration was substituted. Labor and management cooperated in setting up and in administering the arbitration agency. Final settlement of labor

disputes with a proper appraisal of the equities in each case, as well as with a full regard for the public interest, was the function of the War Labor Board. That function could still be performed as long as the Board served as custodian of the wage-stabilization policy but not if decisions on wage issues were made elsewhere.

Out of these fundamental factors came those problems about the degree of control that could be exercised over the Board by the Director of Economic Stabilization. Each time one of those problems arose, it was met by a compromise. Discretion in wage cases was retained by the Board but the area for exercising latitude was successively limited. Tensions created over the wage-stabilization program made effectuation of the no-strike pledge increasingly difficult. If the war had continued much longer than it did, either the rigid wage-stabilization program or the unqualified no-strike pledge would doubtless have given way.

EXPIRATION OF THE NO-STRIKE AGREEMENT

With the end of the military hostilities of World War II in August 1945, the no-strike no-lockout agreement expired. It had been made only "for the duration." The parties meant that to cover "the shooting war." There could be no doubt about this point.

Cease fire orders on the battle fields were looked upon as a signal to reassert the arbitral importance of economic power in industrial relations. Tripartite judgments of the War Labor Board were no longer acceptable to labor and management as final and binding determinations. There were even strong reservations about the desirability of that agency making recommendations that, for reasons previously discussed,⁶⁷ could modify the strength possessed by one party or the other in its bargaining.

With the end of the war, workers who struck might be "ordered" back to work as a moral responsibility but not be-

⁶⁷ See page 99.

cause they had agreed to stay on the job. Management might be "directed" to install certain conditions of employment because they added up to a sound proposition but not because representatives of industry had agreed to accept War Labor Board decisions as final and binding. Victory in the war called for new voluntary understandings between labor and management to replace those that suddenly expired.

The government had to make a move. It had no choice but to try to evolve a new labor program. The one that labor and management created for the war period had expired. These facts should be underlined. A widespread notion still persists that the government erred in not continuing the War Labor Board throughout the reconversion period. The choice in this regard was not the government's; it was for labor and management to make.

Machinery to settle labor disputes peacefully during the reconversion period was urgently needed. Uninterrupted production to facilitate a speedy reconversion to a sound peacetime economy was a prime requisite. That is why the War Labor Board unanimously recommended that the President convene a postwar Labor-Management Conference and ask for new agreements to govern the conduct of collective bargaining in full conformance with the requirements of the reconversion period.⁶⁸

Almost three months were to elapse between the end of the war and the opening session of the President's National Labor-Management Conference of 1945. A policy for the interim period was announced by the President in a statement issued on August 16, 1945.⁶⁹ Uninterrupted production was no less essential because the no-strike agreement had expired. Winning the peace was now the big job to be

⁶⁸ Similar recommendations were made by Secretary of Labor Schwollenbach and by Senator Arthur Vandenberg.

⁶⁹ The policy was effectuated by Executive Order No. 9599 which was issued on August 18, 1945.

tackled and lots of production was needed for this task. Since the blanket agreement of labor and management to arbitrate all disputes was no longer in effect, the President called upon organized labor and management to renew their no-strike no-lockout pledge and asked them to continue to comply voluntarily with the directive orders of the War Labor Board. Modifications of wage-stabilization rules were made at the same time to permit the War Labor Board to stabilize wages in accordance with the needs of the reconversion period.

The President's program was logical and sound. It could work but only if labor and management voluntarily went along with it. The big question was over the reaction of labor and management. Some labor leaders were already threatening strikes. Some representatives of management soon made clear their view that War Labor Board orders didn't mean anything any more. Unconditional victory in the war had created an atmosphere altogether too heady for convincing people that the emergency was far from over.

Before many days had elapsed, there remained not the slightest doubt that the War Labor Board would be unable to do business during the reconversion period in accordance with its wartime practices. Necessary support from labor and management was not forthcoming. But the Board had to continue operations anyway, at least until the impending labor-management conference completed its work. Under the new postwar conditions, the Board determined to decide cases submitted under individual voluntary arbitration agreements. It might be possible to use the customary voluntary arbitration procedures to fill the gap left by expiration of the blanket arbitration agreement. This policy was unanimously approved by the Board.

In each dispute, where an interruption of production would adversely affect the reconversion effort, the parties were to be called upon to submit voluntarily to the Board

the issues between them for final and binding determination.⁷⁰ A case might be certified to the Board by the Secretary of Labor without an accompanying stipulation to arbitrate. Procedures would then be worked out as "adapted to the settlement of that particular dispute." Among the procedures contemplated were hearings at which the parties would be called upon to "show cause" why a dispute should not be arbitrated in conformance with the interim policy announced by the President. In other words, it was decided to create a new system of conciliation, mediation, and voluntary arbitration under government auspices. Beyond these procedures lay only compulsory direction of industrial relations by the government. A move in that direction would be giving up the fight to win the peace before it was started.

A number of dispute cases, one of outstanding national importance, were arbitrated by the War Labor Board under the new policy.⁷¹ But, there was less and less disposition to arbitrate. Resort to work-stoppages was becoming more and more frequent. In the absence of a no-strike pledge, greater dependence had to be placed upon conciliation and mediation procedures while voluntary arbitration was of lesser usefulness. Mediation would somehow have to become the core of government efforts to avoid crippling labor disputes. In an effort to mobilize all available strengths to deal with the new situation, the War Labor Board was made a part of the Department of Labor.⁷²

The order effecting the transfer stated, in part, "The Na-

⁷⁰ See "Joint Statement on Procedure" issued on August 28 by Lewis B. Schwellenbach, Secretary of Labor, and George W. Taylor, Chairman of the War Labor Board.

⁷¹ A critical wage dispute arose in the maritime industry. It was complicated by an impending loss of war risk bonuses. The numerous unions involved and the several associations of operators voluntarily stipulated that the dispute should be settled by final and binding decision of the Board. Hearings were held and the case was so decided by the War Labor Board under its postwar policy (26 WL Reports 509).

⁷² By Executive Order No. 9617 issued on September 19, 1945.

tional War Labor Board in the Department of Labor shall be in all respects subject to and governed by such policies, consistent with law, as the Secretary of Labor shall prescribe; and so much of the functions of the Board as is required to effectuate this subsection is transferred to the Secretary of Labor." This transfer could be construed as a logical step only if the government had decided to abandon its attempts to use voluntary arbitration under government auspices as a means of settling labor disputes and to concentrate upon strengthening the mediation services that the government could offer.

In any event, arbitration by a tripartite board could not be made subject to the direction of any government official. The difficulties in such a set-up had already been experienced in the Board's relationship with the Director of Economic Stabilization. There was no difference of opinion among Board members that they couldn't function as an arbitration board under the direction of the Secretary of Labor. The organization, structure and policies of the War Labor Board were all fashioned to provide a particular kind of voluntary arbitration. Mediation was extensively used by that arbitration board but through participation of labor and management representatives as advocates. The members of the tripartite board could not be made subject to the direction of the Secretary of Labor and still perform their functions on the board of voluntary arbitration.

Many reasons prompted the National War Labor Board to wind up its work as promptly as possible. High on the list was the realization that, without supporting agreements of labor and management, no voluntary-arbitration agency could render significant service in meeting the problems of reconversion as they were emerging. On October 16, 1945, the National War Labor Board announced a unanimous decision of its members to terminate the work of the Board by January 1, 1946. This intention was carried out.

ARBITRATION AS A NATIONAL POLICY

There are essentially three principal kinds of national labor policy. Government may strive to maintain a strictly "hands off" position and look to free collective bargaining for the resolution of all industrial-relations issues. Work-stoppages then have to be viewed as disadvantages to be endured as a fair price for keeping industrial relations in private hands. The Wagner Act epitomized a policy of this general type. Government regulation of industrial relations was at least limited to the preliminaries of collective bargaining. Any interference with collective bargaining was indirect.

Under the second main type of national policy, the government takes on one additional function. It provides services, and may require the use of procedures, designed to facilitate agreement-making between disputants. A form of procedural intervention is undertaken. Obligations of labor and of management to agree and to use work-stoppages as a last resort are emphasized. They become matters of government concern. Although labor and management retain a full latitude in working out their difficulties, the government assumes a responsibility for seeing to it that every effort is exerted by these parties to settle their differences around the conference table. A public interest in minimizing strikes through better bargaining, without any particular emphasis upon the terms of the settlement, is the paramount consideration behind the adoption of this kind of policy. Government conciliation, mediation and voluntary arbitration facilities are the means that are employed to effectuate such a policy.

In the discussion of the National Defense Mediation Board,⁷³ an example of procedural intervention, notice was taken of the fine line that exists between assistance and di-

⁷³ See Chapter III.

rection when government mediation is undertaken. A mediation board with power to recommend is closely akin to a board of arbitration. The difference between the two procedures is marked only by the advance agreement of labor and management that they will be bound by any decision the arbitration board may make.

The work of the National War Labor Board represents another expression of a government policy designed to facilitate and to bring about a meeting of minds of the parties to a dispute. Three characteristics of the Board support that conclusion. They were: derivation of authority from the voluntary no-strike no-lockout agreement; the tripartite composition of the board; and a dependence upon mediation and compliance techniques.

A third principal kind of national labor policy involves government imposition of the actual terms of employment either directly or by specification of limits within which negotiators may agree. A variation of this kind of policy occurs when some form of compulsory arbitration is substituted for the rights of strike and lockout as the final determinant of issues. Under these programs, setting the conditions of employment is removed from the control of labor and management. Neither their agreement nor their economic power is of compelling importance. Government regulation is directly substituted for collective bargaining. Avoidance of such a government policy during World War II, to the fullest possible extent, was the main motivation behind the program that evolved.

As a matter of fact, the labor program of World War II combined examples of all three types of national policy that have just been described. The National Labor Relations Board continued to assist the efforts of employees to organize during the war. Procedures of the National War Labor Board were designed fundamentally to provide assistance to the parties in settling their dispute either by a direct agreement or by securing their acquiescence in a so-called

directive order. Procedural assistance was stepped up to pressure in many instances because of the urgency of war. In the last analysis, however, the War Labor Board was impotent if the parties refused either to agree or to acquiesce. The case became one for the executive branch of the government to handle if a work-stoppage took place.

The organizational and procedural aspects of the wartime program were supplemented by outright government direction of industrial relations in but two particulars. Executive branches of government were empowered by Congress to seize any facility and then to impose the terms of employment in order to bring about termination of a work-stoppage. Specification of limits to the wages that could be paid was the second of the two extreme forms of government intervention that the emergency of war made necessary. Government direction supplanted a meeting of the minds of labor and management as the way of conducting industrial relations in these areas. Despite these two instances, it is fair to conclude that industrial relations during World War II were characterized by an outstanding cooperation between labor, management, and the government. They were conducted in the collective-bargaining tradition.

One of the great challenges in peacetime industrial relations, coming directly out of the war experience, centers about the possibility of cooperatively developing a national policy under which the government renders procedural assistance to negotiators in the interest of securing more agreements and fewer strikes. Government facilities for mediation and voluntary arbitration would, in all probability, be the crux of any such consideration. There is undoubtedly an important place in a government labor policy for both mediation and arbitration if they are voluntarily established and made subject to the continuing approval of labor and management by use of a tripartite board or otherwise.

It is idle, of course, to talk about making voluntary mediation and arbitration procedures available under government

auspices unless labor and management are willing to cooperate in establishing and administering the supporting programs. Nor is the necessary cooperation likely to be forthcoming unless labor and management both recognize the insistence of the public demand for more effective procedures for settlement of labor disputes without work-stoppages. In wartime, labor and management clearly recognized the demand and adequately met it by establishing their own machinery. During the reconversion period, they refused to admit the existence of such a public demand. Congress stepped in and tried to fill the gap.

The failure of the President's National Labor-Management Conference of 1945 to work out any procedures that could come into play when collective bargaining failed, marked a critical turning point in our national labor policy. Experience during the war, as well as the passage of the Taft-Hartley Act in 1947, supports the view that restrictions upon the private rights of labor and management can most soundly be effected, when they become necessary, by voluntary agreement of these parties. Whether or not those voluntary agreements are forthcoming in the future will doubtless have a great bearing upon future changes in our national labor policy.

Chapter V

COLLECTIVE BARGAINING ON TRIAL

THE emergency labor policy of World War II expired in August 1945 with the capitulation of Japan. Labor and management were relieved overnight of their commitment to settle all disputes through the War Labor Board.¹ The no-strike agreement suddenly became primarily a matter of historical interest. However, labor and management were not entirely free to arrange their affairs in any way they desired since the National Labor Relations Act and the Economic Stabilization Act both continued in full force and effect. As matters stood on V-J day, a labor policy for the reconversion period had to be built around the legal requirements of collective bargaining and wage stabilization.

These were the only certain factors in the industrial-relations situation. Immediate resumption of collective bargaining, free of all government regulation, was a principal goal of important segments of organized labor. This policy was also supported by many representatives of industry. The trouble with that policy was not so much the desirability of the goal as the public interests that might be trampled upon in attaining it.

¹ By the terms of the War Labor Disputes Act, the War Labor Board was to continue until "six months following the termination of hostilities. . . as proclaimed by the President or upon the date (prior to the date of such proclamation) of the passage of a concurrent resolution of the two Houses of Congress." But, no real authority derived from the Act to enable the War Labor Board to deal with the labor problems of reconversion. The Board's jurisdiction was specifically limited by the War Labor Disputes Act to disputes "which may lead to a substantial interference with the war effort." By common understanding, that reference was to the "shooting war" and not to its aftermath.

An extensive use of strikes and lockouts was a concomitant of a return to collective bargaining. There was little hope that, in the important cases, labor and management could arrive at an amicable understanding. Yet the public was demanding an uninterrupted production of urgently needed consumer goods. To assure a satisfaction of that demand without wild inflation, wage-stabilization and price-control policies were to be continued by the government. As long as economic regulations and controls remained on the statute books, collective bargaining could not be resumed along pre-war lines.

Conditions were anything but favorable for a complete relinquishment of government wage and price controls. Nevertheless, pressures from both labor and management made some relaxation imminent. A resumption of the rights to strike and to lockout made such a relaxation inevitable. Unless labor and management were given a greater latitude to adjust wages in their dealings with each other, collective bargaining would be sure to produce few agreements. At the same time, latitude could be given only to an extent that would not interfere unduly with the continuing fight against inflation. This was a fundamental limitation. Little room would be allowed for the kind of collective bargaining that labor and management were talking about. Something would have to give.

Voluntarism was subjected to a severe test when the government called once more upon labor and management to restrict their private collective-bargaining rights. These parties were asked to agree upon some form of mutually acceptable program to minimize the use of strikes and, inferentially, to support the government's plan for economic stabilization. That was the formidable task assigned to labor and management representatives at the Labor-Management Conference of 1945.²

² Many suggestions for such a conference had been made. A unanimous recommendation of the War Labor Board was on the President's desk along

The Conference was a major milestone in the history of industrial relations in the United States. It chalked up successes and failures that are noted later on in this chapter. The successes point up a way of developing collective bargaining to meet the needs of our times with a minimum of government direction. The failures led directly to an unprecedented extension of government regulation in the form of the Taft-Hartley Act. For an understanding of these conclusions, one must turn to the record made by the Conference.

The challenge to labor and management—and to voluntarism—was made clear-cut. In opening the Labor-Management Conference on November 5, 1945, President Truman stated, in part:³ "Each of you is now a member of the team which the American people hope will recommend definite policy in the field of industrial relations . . . Our country is worried about industrial relations. It has a right to be. That worry is reflected in the Halls of Congress in the form of all kinds of proposed legislation . . . If labor and management, in an industry or in a company, find that they cannot come to an agreement, a way must be found of resolving their differences without stopping production. Finding the best way to accomplish that result without government directive to either labor or industry—that is your job." No one could have any doubt that a voluntary restriction of private rights in the public interest was expected or that legislation would be a probable result of a Conference failure.

Another voluntary no-strike no-lockout pledge was asked for in no uncertain terms. This time it was not forthcoming. Labor and management insisted upon having more

with a similar report from the Secretary of Labor. The decision to go ahead was crystallized by Senator Vandenberg's letter of July 30, 1945, to Secretary of Labor Schwollenbach, urging an immediate call by the government of a Labor-Management Conference.

³ See the "President's National Labor-Management Conference," Bulletin No. 77, United States Department of Labor, Division of Labor Standards, 1946, p. 37.

freedom in their collective-bargaining relationships than the government believed was compatible with the public interest. Under circumstances to be noted presently, the conferees never even seriously tackled the problem of setting up their own arbitration machinery. They were also quite unable to resolve many of their most fundamental differences with which the Taft-Hartley Act was to deal at a later time. How can one account for the utter failure of voluntarism to meet the needs of reconversion in contrast to the strength it displayed when the problems of war had to be surmounted?

A host of reasons can be advanced to explain the shortcomings of the 1945 Conference. No longer was there an overwhelming patriotic urge to close ranks or to put up with very real provocations as during the war. Now that the war was over, collective bargaining as an agreement-making process seemed much less inviting than the opportunity to test out an enhanced economic power that had been held in check so tightly for four years. There was a surprising anxiety to try out this strength. One heard considerable talk from both sides about the need to battle out a new "alignment of power" as a step prerequisite to the resumption of joint negotiations on a normal basis. These explanations carry weight. Taken all together, however, they are still relatively unimportant as compared with the obstacles to agreement imposed by the economic-stabilization program. Government-imposed restrictions on wages and prices made collective bargaining difficult and voluntary arbitration of wage cases on their merits impossible.

It should be particularly noted that the conditions upon which labor disputes could be settled in 1945 were quite different from those existing at the start of the war. The labor-management conference, which was convened shortly after Pearl Harbor, could agree that all labor disputes, without exception, were to be settled on their merits by voluntary arbitration. Such an agreement could not be made after the

war. Wage cases could not be arbitrated. They had to be disposed of in conformance with the government's wage- and price-stabilization policies.⁴

Wage and price regulations would be an extremely serious impediment to collective bargaining and arbitration under normal conditions. They presented even greater obstacles in the reconversion period when, almost without exception, impending labor disputes were concentrated upon wages as the sole issue. Securing a new no-strike no-lockout pledge didn't depend upon a willingness of labor and management to arbitrate disputes on their merits. The acceptability of existing economic-stabilization policies as guides for the settlement of wage disputes was critical. An agreement not to strike or to lockout would fundamentally be an acceptance of the existing limitations upon wage adjustments.

Economic stabilization was the biggest road block obstructing the way to a no-strike no-lockout agreement for the reconversion period. Many unions were determined to gain substantial wage increases, by strike if necessary, in order to preserve the take-home pay of employees who faced a severe cut-back of overtime hours of work. Wage increases were demanded as a matter of equity that unions believed should be recognized, irrespective of any possible price consequences. The strikes that occurred over this issue were directed as much against the government's wage-stabilization policy as against the employer. Many companies were as adamant as the unions when they insisted that no wage increases at all could be given without a relaxation or an elimination of price controls. Their refusal to bargain

⁴ With the end of the war, a wholly incongruous state of affairs existed. Employees had a right to strike for higher wages. There could be no doubt either of the existence of that right or that its exercise would assuredly collide with the objectives of the Economic Stabilization Act. This dilemma made crystal clear the dependence of the wartime program for stabilization of wages and prices upon the voluntary no-strike no-lockout agreement. The failure of the postwar, labor-management conference was a body-blow to the stabilization program.

brought more pressure upon the government to modify its price-control program than upon the union to capitulate.

Agreement upon machinery for settling labor disputes by voluntary arbitration was not even a remote possibility unless labor and management modified their positions regarding the national stabilization policy or unless the government substantially changed its policy. The odds were that, in the absence of a voluntary no-strike agreement, the stabilization program would give way to the full extent necessary to bring about strike settlements. That is what happened. Among the unfortunate consequences were a widespread public dissatisfaction with collective bargaining and an insistent demand for greater legislative direction of industrial relations. There should be no confusion about the contribution of wage and price stabilization to this result.

It should not be inferred that the government sought to extend the wage controls of wartime into the reconversion period. On the contrary, a greatly modified wage-stabilization program went into effect immediately after V-J day. The unacceptability of that program to both labor and management largely prevented a successful labor-management conference. Because of its vital importance, this postwar wage-stabilization program is the first subject for consideration in any comprehensive analysis of the Labor-Management Conference of 1945.

A MODIFIED WAGE-STABILIZATION PROGRAM

With the end of the war, a precipitate reduction in take-home pay and consequently in the total purchasing power of employees was "in the cards." Widespread layoffs in relatively high-wage war industries were also imminent. More people would have to take employment in the lower-wage, consumer-goods industries. An easing of the tight manpower situation was anticipated while extensive unemploy-

ment seemed to be a distinct possibility.⁵ These and many other new factors had to be accounted for in a new wage-determination equation.

Under the Economic Stabilization Act, the President was responsible for authorizing wage increases necessary to meet the problems of reconversion. He had been "authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost-of-living." That first Presidential order, provided for in the Act, was to stabilize the various factors "so far as practical" on the basis of levels existing on September 15, 1942. Further provisions of the Act authorized the President to make subsequent "adjustments with respect to prices, wages, and salaries to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities."

With reconversion at hand, further Presidential directives were in order. Wage-rates could no longer be maintained at September 15, 1942 levels.⁶ New gross inequities arising during reconversion would require correction. Discernment of the need for a new wage policy was much easier than a sound determination of its component parts. At what level should the new wage-stabilization line be fixed? And by what agency should it be determined? These and many other perplexing questions about a new wage policy had to

⁵ Forecasts about unemployment proved to be entirely erroneous. Planning for "eight or nine million unemployed persons by the Spring of 1946" has come to be looked upon as a prize example of the fallibility of economic forecasting. Government policies designed to avoid deflationary trends undoubtedly aggravated the effect of strong postwar inflationary tendencies.

⁶ Wage-rates were stabilized at September 15, 1942 levels during the war. They were increased, on the average, less than 20% above those prevailing on January 1, 1941 (the base date of the Little Steel formula) although cost-of-living had risen more than 30% by the end of the war. These relationships were tolerable only as long as extensive overtime was worked by most employees. The loss of overtime pay would clearly necessitate an adjustment of the Little Steel formula to bring wage-rates more nearly in line with cost-of-living.

be answered with full regard to the strong opposition in union ranks against any wage stabilization at all.

Considerable experience was at hand about one way in which a new wage policy could come into being. During the war, a program for wage stabilization gradually evolved out of a succession of problems. Wage policy for the reconversion period would likely come about in the same way. In the postwar period, however, collective bargaining should play as large a part as possible. Considerable thought was given, therefore, to the possibility of arriving at a new stabilized level of wages through negotiated agreements. Withdrawal of government regulation over wages in certain areas was the only way of gaining that end. If collective bargaining could be reinstituted to any marked degree, then a return of industrial relations to private hands would also be well under way. Great theoretical merit accompanied that idea as well as many doubts about its practicability.

Only one type of case stood out when a search was made for areas of collective bargaining over wages that could be freed from government regulation. That was the case in which management wanted to give a wage increase and was also willing to pay it out of current profit margins. No price consequences would follow such wage adjustments. During the war, many wage increases of this very type were disallowed solely because they exceeded permissible limits for wage increases. Nor were such rulings arbitrary. Allowing wage increases on the ground of ability to pay would have evoked an irresistible demand for matching adjustments by other companies that lacked an ability to pay at existing prices. Such companies would generally have to raise wages if they wanted employees to work for them.

Denial of employer requests to make voluntary wage adjustments even though they would have no price consequences was the one wartime wage control that was most difficult to justify and to explain in individual cases. As a practical matter, it was a kind of control that would be next

to impossible to enforce during the reconversion period.⁷ There was a chance that elimination of this particular control would permit enough collective bargaining to set a new, negotiated wage level for the reconversion period. A great deal depended upon labor's willingness voluntarily to moderate its wage demands and upon management's willingness to reduce profit margins.

Unions and managements did resume collective bargaining on the limited basis described in a significant number of instances.⁸ In some industries, employees were convinced that lesser wage increases than they had initially demanded, as well as variable wage increases between industries and plants, were far more preferable than a relinquishment or a relaxation of price controls. There was, however, far from a unanimity of opinion about this matter. Management, by and large, continued to insist that no wage increases were possible without corresponding price increases. A large percentage of the unions refused to reduce wage demands to the point where the price level would not be affected. Whether or not collective bargaining could be carried out to any significant extent as long as prices remained under government control was the crucial question that would soon be tested.

One of the most complex problems ever encountered in industrial relations had to be met. Extensive wage and price controls were to be maintained while a greater use of collective bargaining was encouraged. Labor and management were assigned the task of creating new machinery to

⁷ It resulted even during the war in a great number of violations including mis-classifications and "under the table" wage payments.

⁸ Unions affiliated with the American Federation of Labor strongly supported the program for the simple reason that the employers with whom they dealt were ready to negotiate worthwhile wage increases without making them the basis for price increases. To a much larger extent, employers who dealt with unions affiliated with the Congress of Industrial Organizations held the position that no wage increases were possible without a corresponding adjustment of prices. The C.I.O. unions insisted upon uniform and large increases from the mass-production industries.

settle all labor disputes even though the principal dispute between them was determinable only by reference to government regulations. A formidable challenge was implicit even where labor-management relationships were well established and relatively smooth in their operation. Most collective-bargaining relationships were not only relatively new but also undeveloped. That was a consequence of the virtual suspension of collective bargaining during the wartime emergency. Nevertheless, some steps had to be taken to release collective bargaining, at least partially, from government regulation.

It was entirely logical to revise wage-stabilization rules and to call a labor-management conference in the one document as the President did in his statement of August 16, 1945.⁹ An effort was thereby made to reconcile industrial-relations and economic-stabilization necessities. The War Labor Board was authorized¹⁰ "to release proposed voluntary wage increases from the necessity of approval upon condition that they will not be used in whole or in part as the basis for seeking an increase in price ceilings." Restrictions on wage increases were thus entirely removed in respect to those adjustments necessitating no price increases. This was the central note of the first reconversion wage policy. Collective bargaining was released from government regulation to the maximum extent possible under then existing price controls.

Several thousand collective-bargaining agreements were consummated in a short period of time under the new

⁹ The modification in wage-stabilization regulations as made by that statement had previously been recommended by unanimous vote of the National War Labor Board. This fact supported a belief that the new wage rules were acceptable to both labor and management and would facilitate the work of the impending labor-management conference. It should be noted "for the record," that John W. Snyder, then Director of the Office of War Mobilization and Reconversion, cooperated whole-heartedly with the War Labor Board in working out its reconversion program.

¹⁰ Executive Order No. 9599, issued on August 18, 1945, was for the purpose of formally effectuating the August 16 statement of policy.

policy.¹¹ Practice showed that, with the full cooperation of labor and management, it would work. Offsetting disadvantages soon became all too apparent. Linking product prices with wage determination in collective bargaining created many impossible situations. Whether or not a certain union wage demand could be met without a price increase was not easily answered in economic terms. It was even harder to arrive at an answer in collective bargaining. The entire subject of cost-price relationship was considered to be simply not negotiable by many a management when the unions pressed the point. Management sometimes contended that, since a wage increase of any amount would necessitate price adjustments, assurance of price relief was necessary before wage negotiations could be undertaken. In many industries labor and management "squared off." The economic-stabilization program hung in the balance.

Reference has been made to the hope that wage agreements made within the limitation of existing price controls would establish a new stabilization line. Labor and management were asked to agree upon a level of wages that could be supported by existing price structures. If a large number of agreements were made, that level could then be looked upon to give standards for approving wage increases in cases even where consequent price increases were required. No one can tell what might have resulted from that policy had it been permitted to run its course. It is possible that the so-called first round of wage increases would have been more like \$.08 or \$.10 per hour, instead of \$.185 per hour, and that price controls would have been more rigidly held for a longer period. A great deal depended upon the volume of wage adjustments necessitating price increases that would have to be made.

¹¹ Approximately 4000 labor agreements were made in conformance with this policy according to estimates made by labor leaders. The agreements were not numerous in the basic mass-production industries and they were made largely by unions affiliated with the American Federation of Labor.

In certain plants and industries no wage increases at all, or only unreasonably low ones, would result from the limited collective bargaining that was authorized. Disputes would presumably arise in those cases. Deciding them by reference to wages already established through collectively bargained agreements elsewhere would be in marked contrast to use of government directives specifying some new wage level.¹² This aspect of the readjustment program was covered by that part of the President's August 16 statement which read: "The reconversion from wartime to peacetime economy will undoubtedly give rise to maladjustments and inequities in wage-rates which will tend to interfere with the effective transition to a peacetime economy. For the remaining period of its existence, the Board¹³ should be given authority to deal with those maladjustments and inequities, whose scope and nature cannot be clearly foreseen. I am, therefore, issuing a new Executive Order which will carry forward the criteria for passing upon wage increases as originally laid down in Executive Order No. 9250, and which will also vest in the Board authority to approve or direct increases which are necessary to aid in the effective transition to a peacetime economy."

It was proposed, then, that (1) labor and management should be entirely free to agree upon any wage increase as long as product prices were not increased in consequence, and (2) the War Labor Board should be given a wider latitude in evolving new wage-stabilization rules adapted to reconversion needs. Since Executive Order No. 9250 was reinstituted, the Board's right to modify or to abandon the Little Steel formula was returned to it.

As long as a wage policy had to be worked out under cri-

¹² The contrast became markedly clear in later events. In order to settle strikes, the government established an \$.185 per hour wage-increase pattern through fact-finding boards in particular cases. The wage increase was not related to any negotiated agreements and, in fact, generally exceeded the increases that had previously been negotiated.

¹³ Reference is, of course, to the National War Labor Board.

teria and procedures initially set forth in Executive Order No. 9250, inhibitions were bound to loom large. Wage adjustments affecting prices remained subject to the approval of the Director of Economic Stabilization and he was authorized to issue restrictive policy directives at any time. Experience during the war had shown that the economic controls vested final authority over wages in the Director and severely limited the rights of labor and management as well as the judgment of the War Labor Board.

Wage adjustments in prospect under the revised policy were far less than many unions were determined to gain. They were also far beyond what many employers were willing to give as long as they were subject to price controls. Strikes that occurred in 1945 and 1946 were not merely disputes between labor and management over sharing the returns from business operations. They centered rather about the government's determination to retain a reasonably effective economic-stabilization program. Failure of the government to work out a wage-stabilization policy acceptable to labor and management spelled the doom of the 1945 Labor-Management Conference before it had gotten under way.

ABILITY TO PAY

The August 16, 1945 wage policy rested upon principles markedly in contrast to those followed during the war. During the war, governmental determination of wages was in accordance with rules uniformly applicable, irrespective of ability to pay. This was replaced by a new policy of setting wages primarily in terms of ability to pay under existing price ceilings. Such a drastic shift was the only way of introducing a greater opportunity for collective bargaining while maintaining reasonably adequate controls over prices. The attempt to bring about a resumption of collective bargaining may have been premature or the continuance of price control might have been incongruous. At any

event, the two principles soon proved to be irreconcilable.

Basing wage changes upon ability to pay under existing price ceilings meant that negotiated wage increases would vary between plants and industries. In a competitive economy such variations are a normal and not at all an unusual circumstance. Wage changes are not uncommonly correlated with company or industry resources and they are often restricted by a pressing requirement to keep product prices competitive. In a sense, price ceilings existing in August 1945 were expected to provide much the same kind of a restraint upon wage increases and an influence upon profit margins as would normally be exercised by competitive necessity.¹⁴

Price ceilings were at best an artificial and inadequate substitute for competition. Workers might see their way clear to take a lesser wage increase than that given by another plant or industry upon being convinced of the desirability of doing so to preserve their jobs and to secure steady employment. Now they were being requested to take lesser increases than fellow employees in order to protect consumers against higher prices and to avoid a possible inflation. The self-interest was neither directly felt nor clearly perceived. Union demands were pressed for a uniform wage increase in all industries large enough to preserve or increase the real wages of prewar days. A national pattern of wage increases was sought for application to all industries. And, of course, it could not possibly be effectuated through the usual kind of collective bargaining.

By the time the Labor-Management Conference convened, labor ranks were divided over the national labor

¹⁴It should be noted that a large demand for goods and a small supply of goods brought about a virtual suspension of competition. Management efficiency and low costs were not conditions prerequisite to selling a plant's entire output at a profit. This very condition made the restraints of the economic-stabilization program necessary if consumer interests were to receive adequate protection.

policy that should be followed during reconversion. In general, the C.I.O. supported the formulation of a national wage pattern whereas the A. F. of L. favored working out the wage problem through collective bargaining on a plant or industry basis. Management views, by and large, coincided more nearly with the A. F. of L. position but with the reservation that adjustments of wages could only be effectuated if price controls were relaxed. The outstanding domestic problem was the wage-price dilemma. While it hovered continually in the background of the Conference, there never was much doubt that a labor-management agreement to resolve it would not be entered into.

THE LABOR-MANAGEMENT CONFERENCE AND THE WAGE POLICY

The fate of the economic-stabilization program and of machinery for the peaceful settlement of labor disputes was largely in the hands of the representatives participating in the President's National Labor-Management Conference. When the Conference convened on November 5, 1945, the wage policy embodied in the President's August 17, 1945 statement had not been accepted either by labor or by management. Plans for terminating the War Labor Board were well under way. Many issues were pressing for attention. They failed to erupt into a rash of "big" strikes in 1945 only because the labor-management conference was still to come. Unions tended to "wait and see" whether anything "constructive" would come out of the deliberations.

At an early meeting of the Executive Committee of the Conference,¹⁵ Mr. Philip Murray "expressed the view that, although wages were not a specific item on the agenda, current events were demonstrating that solution of procedural matters would not in any way solve current unrest and pending labor disputes until a solution was found on the

¹⁵ Held on November 7, 1945.

pressing wage problem.”¹⁶ In other words, procedural machinery to settle disputes was not a solution to the labor dispute problem as long as further revisions in wage-stabilization rules were not made.

Mr. Murray proposed that the Conference recommend “sincere and genuine collective bargaining” undertaken upon the premise that substantial wage increases are imperative “to cushion the shock to our workers, to sustain adequate purchasing power, and to raise the national income.” No mention was made of imposing any limitation whatsoever upon wage increases in order better to maintain existing price ceilings. A wage policy quite different from that enunciated by the President on August 16 was evidently being proposed. The Murray proposal was fundamentally a suggestion for labor and management to work out their own national wage policy. If they could succeed in such an attempt, and if the result was acceptable to the government, there was still a chance that the Conference might successfully perform the tasks assigned to it. That chance never materialized. No really serious discussion of wage policy was engaged in by the Conference.

Speaking for the management group on Mr. Murray’s proposal, Mr. Henry Prentis suggested¹⁷ “that the Conference should not consider national wage policies and not attempt to define formulas to implement existing policies.” Management proposed that the Conference confine itself simply to recommending “subject to certain conditions, that employers and employees engage in sincere collective bar-

¹⁶ “The President’s National Labor-Management Conference,” Bulletin No. 77, United States Department of Labor, Division of Labor Standards, 1946, p. 12. All of the quotations included hereafter in this chapter are from this Bulletin which is the final report of the Conference to the President. The report is signed by representatives of the American Federation of Labor, the Congress of Industrial Organizations, the National Association of Manufacturers and the United States Chamber of Commerce.

¹⁷ At the November 16, 1945 meeting of the Executive Committee of the Conference. There was a delay of more than a week before management was ready to state its position on the wage issue.

gaining on wages." An unreserved acceptance of collective bargaining by management representatives was not without significance. Joint dealings between labor and management were doubtless envisioned as preferable to continued government administration of wages.

It soon became apparent that neither the proposition of Mr. Murray nor that made by Mr. Prentis could receive the unanimous vote required under the rules of the Conference to pass any resolution. Mr. John L. Lewis then advanced what he termed a "positive resolution." He proposed a postwar program dedicated (1) to the attainment of high production at lower unit costs and (2) to shorter hours and higher wages for labor. That proposal was objected to apparently because it dealt with long-term problems and was not related to the immediate dilemma over wages and prices.

All three proposals were referred to a subcommittee of the Executive Committee with instructions to "compose the differences and report back." Representatives of the C.I.O. vigorously opposed such action. They insisted that a vote be taken on the Murray resolution and refused to serve on the subcommittee.

Reporting for the subcommittee on November 29, Mr. William Green presented a draft resolution which five members agreed should replace the three proposals referred to it. The Conference was declared "to be not a wage conference." Management and labor were urged "to seek a solution to wage problems through participating in genuine collective bargaining." Lack of C.I.O. votes in support of the draft resolution precluded its referral to the full Conference.

Agreement upon a national wage policy was quite unlikely even if the subject had been seriously tackled and thoroughly discussed by the conferees. Not fully aware of the impasse over wages, the country looked hopefully to the Conference to consummate some kind of a no-strike agreement at least for the critical part of the reconversion period. A heavy concentration of effort upon the creation of machinery to

serve as a substitute for strikes over new agreement terms was expected. Yet this vital matter was not even on the Conference Agenda. It was discussed relatively briefly by the Executive Committee only after many delays in coming to grips with the problem and then with reluctance. Absence of the main question from the Conference Agenda calls for some explanation.

THE CONFERENCE AGENDA

Preparations for the Conference required several months of preliminary work. Most of this work was undertaken by the Agenda Committee.¹⁸ Unanimous agreement was reached upon the subjects to be discussed by the Conference. The subjects were confined to various ways of improving collective bargaining. In so interpreting its task, the Agenda Committee carefully focused attention upon one statement that had been included by the President in his call for the Conference. He asked, among other things, for agreement upon "long-term policies which will make possible better human relationships in American industry." Using this statement as a text, the Agenda Committee confined its attention to ways and means by which labor and management could build up their relations free of government direction or regulation.

From the start, a disposition to avoid coming to grips with the short-run problems of the reconversion period typified the conference. Neither labor nor management was willing to concede that another War Labor Board, or anything like it, should carry over beyond the end of hostilities. As far as industrial relations were concerned, the problem of reconversion was conceived as getting collective bargaining under way quickly and effectively. It was agreed by the Agenda

¹⁸ Representatives on the Agenda Committee were appointed by the presidents of the National Association of Manufacturers, the United States Chamber of Commerce, the American Federation of Labor and the Congress of Industrial Organizations. In addition, one member was appointed by the Secretary of Labor and one member by the Secretary of Commerce.

Committee, and the principals, that priority should be given to "planning for long-term, rather than short-term remedies, however vital it may be to settle immediate problems."

Left hanging high in the air was the question of how labor and management would carry on their collective bargaining without work-stoppages. Yet, that was the principal "worry" of the public. How to make collective bargaining work better in the long run was an eminently worthy topic for deliberation. But the purposes of the Conference were advertised in entirely different terms. In relation to the immediate and short run needs of the country, the Conference must be recorded as a failure.

Judged solely in terms of its own stated purposes, the Conference was successful to a limited but encouraging degree. The successes are perhaps of greater current interest now than the failures. Appraisal of the successes gives a basis for answering the pertinent query: Do labor-management conferences have any useful part to play in the further improvement of collective bargaining relationships? In addition to accounting for its failures, attention is directed in this chapter to the accomplishments of the Conference in terms of what it actually set out to do.¹⁹

WHEN COLLECTIVE BARGAINING RESULTS IN NO AGREEMENT!

Mention has already been made of the absence from the Conference Agenda of any reference to machinery for assist-

¹⁹ Seven topics for discussion were recommended by the Agenda Committee. They were, in summary form, the extent to which industrial disputes could be minimized by (a) full and genuine acceptance of collective bargaining by management, (b) full and genuine acceptance by organized labor of the right and responsibilities of management to direct the operation of an enterprise, (3) full use of the National Labor Relations Act and State Labor Relations Acts, (d) orderly procedure in negotiating first contracts between a union and an employer, (e) provisions in collective-bargaining agreements for the handling of problems arising in the day-by-day operation of a plant, (f) improving and strengthening the U. S. Conciliation Service, and (g) lessening jurisdictional and other inter-union disputes. It was proposed that six working committees be set up to explore and report upon these seven topics to the full Conference.

ing the peaceful settlement of disputes after the failure of negotiations. This subject could, nevertheless, receive consideration in plenary meetings or in sessions of the Executive Committee. Attention to the subject came through a report of the Public Hearings Committee.

This was a special committee set up to hear complaints and to receive suggestions from groups and organizations not directly represented in the Conference itself. Many of these groups protested their exclusion so vehemently that some procedure had to be set up to bring their points-of-view directly before the Conference. A large number of these "outsiders" unquestionably wanted the conferees to grapple with the question of how to prevent strikes after a failure of collective bargaining. This matter was raised almost continuously by those who appeared before the Public Hearings Committee.

In reporting to the Executive Committee on November 20, the Public Hearings Committee referred to a number of proposals, made to it by outside groups, as being "explicitly pertinent to the printed agenda . . . for preventing, minimizing, and facilitating the settlement of labor disputes." One proposition was for the development and improvement of "the structure and machinery of voluntary arbitration" so that disputes could be arbitrated "according to specified criteria and within specified areas of conflict." Another suggestion was that provision should be made to use "the procedures of fact-finding regarding the issues in disputes, whether by competent public or tripartite experts, before any strike or lockout is resorted to for the final determination of the dispute."

Here was a vivid reflection of the current public interest in arbitration and fact-finding procedures as devices to minimize work-stoppages. There could not be the slightest room for doubt about what the public wanted labor and management to agree upon. In this regard, a telling note was sounded in the second supplementary report of the

Public Hearings Committee.²⁰ The concluding sentence of that report reads: "It is significant that not only the representatives of the consumer groups, cooperative groups representing wide public interests, and other civic groups, but also that the responsible officials of the National Catholic Welfare Conference, representing the Bishops of the Church, officials of the Synagogue Council of America, representing the six national bodies of the Jewish faith, and of the Federal Council of Churches of Christ in America, composed of twenty-six Protestant denominations, presented statements in support of setting up machinery for voluntary arbitration, improved conciliation, and fact-finding as effective aids in the settlement of industrial disputes."

In response to the widespread expectation of the general public that it should do so, the Executive Committee finally agreed to consider the possibilities of using so-called fact-finding to minimize work-stoppages. Pressure of the same nature arose from within the Conference. Several working committees tentatively explored the fact-finding approach even though it was not on the Agenda. Not much progress was made in the committee discussions because of an uncertainty about jurisdiction. One committee finally passed a resolution proposing that the Executive Committee either evaluate the usefulness of fact-finding boards directly or else assign the subject to one of the working committees.

Consideration of the pros and cons of the fact-finding technique by the Executive Committee was both extensive and serious.²¹ It represents the only major attention given by the Conference to the possibility of devising some procedure to minimize industrial disputes over the terms of future agreements after a failure of negotiations. Labor's opposition was most pronounced when management suggested that

²⁰ This report was made to the Executive Committee on November 28, 1945.

²¹ See Appendix A of the Report of the President's National Labor-Management Conference entitled "Summary of Executive Committee Discussion of Fact-Finding as a Technique for Settlement of Labor Disputes."

a "cooling off" period should be required while fact-finding was under way. This was dismissed by the labor representatives as a wholly unacceptable proposal to restrain the right to strike. No conclusions were reached and no report on fact-finding was made to the full Conference.

In addition to the discussion of fact-finding by the Executive Committee, two working committees came to grips with the problem of what happens when collective bargaining fails to produce an agreement. They did so by discussing the possible use of voluntary arbitration in particular cases as an adjunct of collective bargaining. Since voluntary arbitration is ordinarily used only upon adoption in individual cases, the approach taken by these two committees was both reasonable and logical.

The committee on "Existing Collective Agreements" concluded that if "negotiations should fail, the parties should make early use of conciliation, mediation, and, where mutually agreed to, arbitration." A highly constructive amplification of the way in which voluntary arbitration might be more extensively used was made in the report of the Committee on "Initial Collective Agreements." It was recommended that "If direct negotiations and conciliation have not been successful, voluntary arbitration may be considered by the parties. However, before voluntary arbitration is agreed upon as a means of settling unsettled issues, the parties themselves should agree on the precise issues, the terms of submission, and the principles or factors by which the arbitrator shall be governed."

This recommendation represented a significant advance in industrial-relations thinking. Attention was directed for the first time to the real importance of the stipulation to arbitrate. A vigorous follow-through on this recommendation is probably needed before voluntary arbitration of new agreement terms will be extensively and satisfactorily used. It is indeed unfortunate that the committee confined itself to a simple statement for the guidance of parties in individ-

ual cases. The obligation of disputants to come to an arbitration agreement under certain circumstances was not recognized and no attention was given to the beneficial uses of voluntary arbitration in arriving at terms of new agreements that have been discovered by labor and management in a number of industries.

As far as recommendations of the Conference were concerned, the national labor policy for the government was to be limited to a call upon labor and management to engage sincerely in collective bargaining, but if they found themselves unable to arrive at a meeting of minds by their own unassisted devices nothing at all should be done to avoid work-stoppages.²² At any event, no agreement was reached as respects any steps that should be taken by the parties to a dispute, or by the government, if negotiations reached an impasse. A return to free collective bargaining was thus recommended including the use of strikes and lockouts without formal restraint, to fulfill their traditional purposes.

Collective bargaining was put squarely on trial by the action or inaction of the Conference. Labor and management could not possibly have been unaware of the intensity of the public demand for uninterrupted production. Nor should they have been unconscious of the likelihood that extensive legislation would be passed if the return of collective bargaining was accompanied by serious plant shut-downs. The inability of the Labor-Management Conference of 1945 to arrive at agreements in support of the reconversion needs of the country was the first step toward the Labor-Management Industrial Relations Act of 1947.

SUCCESSSES OF THE CONFERENCE

A failure to carry out the major tasks assigned to it by the public is the outstanding characteristic of the Labor-Man-

²² The usefulness of the Conciliation Service was recognized but no further governmental assistance was deemed compatible with collective bargaining.

agement Conference of 1945. The meeting constitutes, nonetheless, a notable landmark in the history and development of collective bargaining in the United States. Directing the discussions to "long-term considerations" had several advantages that have been commonly overlooked. A number of fundamental ideas about collective bargaining were crystallized. Various specific recommendations were made as to how joint dealings could be more effectively conducted. Accomplishments along these lines are significant whenever plans for future industrial-relations policies are taken under advisement.

For the first time, at this conference labor and management representatives met together at the national level without arguing about whether or not collective bargaining was desirable. Their sole aim was to reach common understandings about how it could function better. The right of employees to be represented by unions of their own choosing was no longer a subject of dispute in the United States. In a very real sense, the Labor-Management of 1945 goes down on the books as the session where American industry formally accepted collective bargaining in principle. If that was the end of an era, it also marked the beginning of a new one. Whether or not government rules to protect employee organization provided unions with more than an "equality of bargaining power" became one of the critical issues in the new era.

As will be noted presently and in some detail, employers insisted that unions were favored with an unreasonably large amount of government protection. They believed that the organization rules established under the Wagner Act should be drastically changed. But since the right of employees to bargain through outside unions was not questioned at any time, it can be concluded that one of the great conflicts in American labor history had come to an end.

Another notable sign of industrial-relations progress was given by the Conference. In accepting the Conference

Agenda, leaders in labor and management ranks assumed a responsibility for directing and developing the agreement-making potentialities of collective bargaining by means of general policy understandings. Concepts of collective bargaining as a strictly self-effectuating process became obsolete and a new procedure for collective bargaining was initiated by the 1945 Conference. It was implicitly recognized that labor and management have an obligation to spell out, in general terms, those procedures and practices that, if followed by negotiators, will make for more agreements and fewer strikes. Agreements of a general nature made to define "correct" collective-bargaining procedures was a new technique for joint dealing. Virtually unlimited possibilities in this direction were opened up.²³

The principal "lesson to be learned" from the 1945 Conference is that great latent possibilities for improving collective bargaining are inherent in general procedural and policy agreements between representatives of labor and management. They can serve as guides in particular negotiations. With all of its shortcomings, the 1945 meeting was an encouraging preview of the kind of progress that can be made if labor and management voluntarily assume responsibility for giving leadership and conscious direction to the development of collective bargaining. Labor-management conferences, both national and regional in scope, can be and should become a standard part of the American industrial-relations pattern.

²³ Reference has already been made to the futile effort of Mr. Murray to secure a conference understanding with respect to wage policy. (See page 220.) His suggestion for an anti-discrimination policy fared better. The Executive Committee and the Conference unanimously adopted a resolution reading: "Resolved, that the Labor-Management Conference urge on all elements of labor and management the broad democratic spirit of tolerance and equality of economic opportunity in respect to race, sex, color, religion, age, national origin or ancestry in determining who are employed and who are admitted to labor-union membership." Too much significance should not be attached to the resolution because no provisions were made for a follow-through. It does indicate, however, that general agreements between labor and management respecting broad policy questions are possible in addition to understandings on procedural matters.

In addition to the successes of an intangible nature, as just noted, a number of concrete results of the Conference should be inventoried. Specific understandings, unanimously approved, as to what constitutes good collective-bargaining procedure are significant in their own right. They are tangible evidence of the value of policy agreements of the kind just extolled.

The working committee on "Initial Collective Agreements" dealt with policies to be followed in negotiating "first agreements" so that "strikes and lockouts may become the last resort."²⁴ Tried and tested negotiating practices were codified and unanimously recommended for general use. Differences in individual negotiations can unquestionably be narrowed by a widespread application of the understandings that were reached.²⁵ In adding up the achievements of this particular committee, reference may again be made to the recommendations for developing voluntary arbitration of new agreement terms as an integral part of the collective-bargaining process. As mentioned previously, a highly constructive forward step was taken in the recommendation that "the parties themselves should agree on the precise issues, the terms of submission, and the principles or factors by which the arbitrator shall be governed." As a result of conference deliberations, the stipulation to arbitrate stands out as the instrument by which voluntary arbitration of future contracts can be more thoroughly integrated with collective bargaining.

²⁴ A differentiation was made between the problems of negotiating a first agreement and of renewing an expiring agreement because peculiar difficulties are encountered in each situation.

²⁵ Attention was unfortunately not given to the pros and cons of limiting initial agreements to a relatively few simple terms in order that collective bargaining might have an auspicious start. Widespread efforts to secure first agreements comparable in scope and terms to those built up through years of joint dealing, contribute to collective-bargaining failures and account for the breakdown of many initial agreements in day-to-day application. This aspect of the subject of initial agreements could profitably be considered at a subsequent conference.

Perhaps the outstanding achievement of the Conference was the unanimous recommendation, proposed by the working committee on "Existing Collective Agreements," respecting the use of arbitration to resolve disputes over application of contract terms. This report read: "Collective bargaining agreements should contain provision that grievances and disputes involving the interpretation or application of the terms of the agreement are to be settled without resort to strikes, lockouts, or other interruptions to normal operations by an effective grievance procedure with arbitration as its final step." This conclusion was arrived at only after close examination of tried and tested practices for handling grievances in day-by-day collective bargaining. Labor and management fully recognized their obligation to conduct this aspect of their relationship without work-stoppages.

One other working committee, that on "Conciliation Services," made a number of recommendations that were unanimously adopted by the Conference. Strengthening and improving the work of the Conciliation Department of the United States Department of Labor was the objective. An advisory committee of labor and management representatives was suggested as a means of familiarizing the Director of the United States Conciliation Service with the practical operating problems that must be overcome if conciliation is to be made more effective. Such a committee was later established. The results were most salutary but also quite ephemeral. Congress substituted an independent Mediation Service for the Conciliation Service in 1947 when the Taft-Hartley Act was passed.

The record of the Labor-Management Conference of 1945 is distinctly not a list of wholly unrelieved failures. Successes achieved add up to an important contribution to the constructive development of industrial relations. A new technique in labor-management relationships was inaugurated. Its usefulness was attested by the procedural recom-

mendations relating to the conduct of collective bargaining which have just been mentioned. These concrete accomplishments may be summarized as follows:

1. a codification of the procedures that should be followed in collective bargaining negotiations to facilitate agreement-making, particularly as respects initial contracts.
2. suggestions for improvement in the conciliation services provided by the federal government.
3. recommendation of a program to permit the settlement of grievances without interruptions to production.
4. specification of the groundwork upon which voluntary arbitration of the terms of future agreements may be built.

Unanimous agreements between outstanding labor and management officials as respects procedural steps to be followed in individual negotiations was something quite new in industrial relations. Only the pressing and critical needs of reconversion made these accomplishments appear insignificant. At any other time, the successes of the Conference might well have been universally applauded as great forward steps in the building of a sound industrial-relations structure.

SUBJECTS OF WIDE DISAGREEMENT

To those intimately concerned with industrial relations, the report of the Labor-Management Conference of 1945 has a further significance. Disagreements were carefully recorded. Although three Conference working committees came up with unanimous recommendations, and they were adopted in plenary session, three other committees were unable to agree upon anything significant. Statements covering their differences were a revealing preview of Congressional debates that were to be held later prior to passage of the Taft-Hartley Act. A failure of the conferees to

settle several of their most pressing problems by voluntary agreement resulted in their submission to Congress for "final" determination.

Modification of the Wagner Act was the "must" subject most insistently pushed by employer representatives at the Conference. They attacked under the banner—"equality before the law." Management insisted that unfair union practices in the organization of employees should be outlawed. Admitting the propriety of prohibiting unfair practices of employers, management's position was that employees should also be protected against coercion by the unions. Later events were to show convincingly that the days of a "one-sided" labor law were over. Failure of the unions to perceive the strength of the employer position, or the strong public support behind it, was a gross miscalculation. In choosing to stand adamantly for the Wagner Act without a single change, unions dug into a badly exposed position.

Employer representatives also maintained that unions should be made equally responsible with companies for carrying out the terms of labor agreements. It was claimed that employees had got into the habit of irresponsibly violating labor agreements at will, especially as respects the no-strike clause. Unions had shown themselves to be quite incapable of doing anything very effective about such violations according to management. It was reasoned: management can be forced at law to live up to their agreements; unions should have a similar obligation.

"Equality before the law" was a covering phrase for one further management contention. Since monopolistic practices of corporations had long been adjudged to be anti-social, a demand was made for a similar restriction upon the monopolistic tendencies in union programs.

Serious charges were levied against the government's existing labor policy by management representatives. Changes in the Wagner Act were demanded not solely on

the ground of fair dealing and as a means of giving "equality before the law." It was also alleged that, by applying the Wagner Act to protect union organization, the government did not facilitate collective bargaining but, on the contrary, provided unions with such an undue power and such a privileged position as to make peaceful collective bargaining impossible. What constituted an "equality of bargaining power" in terms of government protection of the right to organize was made an issue.

Management sought not merely a modification of the law governing union organization but campaigned for an extension of government regulation into additional aspects of the collective-bargaining relationship. An earnest discussion of the problems raised by management might conceivably have resulted in agreements for moderate modifications of the Wagner Act. Extreme legislation might then have been unnecessary and avoidable. Positions taken by the conferees were unfortunately too far apart for any such constructive development to come about.

In evaluating the enhanced economic power that unions undoubtedly possessed, management representatives tended to overestimate the Wagner Act as a contributing factor. They greatly underestimated the effect of a general economic situation in which there were more jobs than men to fill them. Management ideas about the proper role of government in industrial relations tended, therefore, to be somewhat extreme. Unions knew that their power derived mainly from the economics of the situation. They looked ahead to the future when jobs might be scarce and were strongly averse to agreeing to any change whatsoever in the Wagner Act. Every protection afforded by the Act might be vitally necessary in days ahead, they felt, to prevent a collapse of the labor movement.

The "status quo" position of the unions was untenable in at least one important respect. Changes in the Wagner Act were due if for no other reason than to take legislative

account of the vast experience accumulated during the ten years of its operation. Experience showed it to be far from a perfect law. Improvements in it were overdue. A labor admission on the record that any single change was desirable would, many union officials believed, serve merely as a springboard for Congressional emasculation of the Act. For this reason, and because of doubt about union security in the future, a "stand-pat" position was taken by the unions.

The inability of the Conference to handle the labor-management dispute over the Wagner Act was perhaps the most serious failure of voluntarism in the postwar period. Some of the most unworkable provisions, as well as the "anti-union" and "anti-industry" sections, of the Taft-Hartley Act might have been forestalled by labor-management recommendations for "mild" changes in organizational rules that could have been made in the interest of both parties. But above all, the government-managed collective bargaining inaugurated by the Taft-Hartley Act might have been avoided.

Management's position was most precisely set forth by its representatives who stated:²⁸ "For years, in the public interest, legislation and government relations have controlled the activities and defined the responsibilities of employers. Likewise in the public interest, the activities of labor organizations should be controlled and their responsibilities defined to assure equality of status before the law. Equity requires that both parties to a labor agreement be equally answerable as entities in judicial proceedings for conduct in violation of contract or legal requirements."

That statement may be looked upon as the first formal postwar demand for an extension of government regulation in the field of industrial relations. Management's position was not confined to requested changes in rules governing the organization of employees. No simple modification of

²⁸ Management report of the working committee on "Collective Bargaining."

the Wagner Act was demanded. Industry asked rather for a fundamental change in government labor policy. It advanced a program for government supervision and control of unions and of certain aspects of collective bargaining as well. Reconciliation of this position with the stated purpose of both sides to get the government out of industrial relations is not possible.

As previously mentioned, labor representatives held entirely contrary views about the need for amendment of the Wagner Act. They went so far as to characterize the management program as an effort "to impose industrial slavery on American workers."²⁷ As respects "sanctity of contract" there was no disagreement in principle. Labor representatives contended, however, that the problems over "union responsibility" management raised could only be worked out around the conference table in each situation. They maintained that: "The customary provisions incorporated in collective-bargaining agreements which permit management to discipline any employees, subject to their right to appeal through the grievance machinery of the agreement, for any violation of its provisions are desirable and necessary for the proper administration of the agreement." Over these and other subjects, including the desirability of industry-wide bargaining, management and labor positions were wide apart.

²⁷ This comment was made in the labor report of the "Committee on Representation" and in response to two specific employer proposals. One of these proposals was that there should be no interruption of production pending the determination of any representation question by an appropriate government board. Organization strikes and many jurisdictional strikes would both have been outlawed by such a rule. Management representatives also proposed that after a government board had made a determination of a representation question "both the employer and the certified collective-bargaining representatives should be protected by that agency in the negotiation and orderly administration of a labor agreement against interference by any other person or organization." At the root of this suggestion was increasing dissatisfaction with strikes undertaken to compel an employer to deal with a union other than the one certified by the National Labor Relations Board. These were termed: "Strikes to compel an employer to violate the law" since management was legally required to deal with the certified union.

Other deep-seated disagreements between labor and management were reported by the Conference working committee on "Management's Right to Manage." Its assignment was an exploration of "the extent to which industrial disputes can be minimized by full and genuine acceptance by organized labor of the inherent right and responsibilities of management to direct the operation of an enterprise."²⁸ In the report of this committee, the question of "management security" was formally introduced as a major issue of industrial relations. Whether or not it would be handled in collective bargaining more effectively than the union-security issue had been was at least partially dependent upon how well the Conference dealt with the subject.

Employer representatives were strongly of the opinion that management's ability to perform its essential functions was being seriously jeopardized by union efforts "to extend the scope of collective bargaining to include matters and functions which are clearly the responsibility of management." Various management functions involved in the operation of a business were listed and classified. Matters considered to be "clearly the functions and responsibility of management and . . . not subject to collective bargaining" were placed in one category. A separate list was then made of those subjects "in respect to which it is the function and responsibility of management to make prompt initial decisions in order to insure the effective operation of the enterprise, but where the consequences of such actions or decisions are properly subject to review."²⁹ Labor representatives were asked to agree upon such a division of topics as the best way to settle the management-security issue.

A conscientious effort was made to arrive at an understanding along the lines proposed by management. Labor members freely acknowledged that "The functions and

²⁸ The committee interpreted its assignment to be: "The extent to which industrial disputes can be minimized by full and genuine acceptance by organized labor of the functions and responsibilities of management to direct the operation of an enterprise."

²⁹ The review would be through the established grievance procedure.

responsibilities of management must be preserved if business and industry is to be efficient, progressive and provide more good jobs." Despite substantial agreement on the general principle, a deep and a wide gulf developed between the conferees. Management's effort to retain sole control over all functions construed as essential for the proper performance of its duties would limit the scope of collective bargaining more severely than had been found necessary or desirable in many plants and industries. As a "survival" issue for management, subjects that have to be excluded from collective bargaining undoubtedly vary with types of collective-bargaining relationships. Extending the scope of collective bargaining rather broadly, usually raises no question of management security as long as this is done by voluntary understanding. The use of economic force to resolve a dispute over the scope of collective bargaining is the aspect of the case that makes the management-security issue critical.

The issue can be stated in terms of the need to define collective bargaining, to preserve management's security, or to delineate the scope of collective bargaining. However treated, the issue is certain to be among the most critical industrial-relations problems over the next five or ten years. Management security and union security are emerging as related issues.

Can the subjects properly within the scope of collective bargaining be precisely specified as a means of meeting the demand for management security? This question was fully explored by the Labor-Management Conference. To the unions it appeared that with an affirmative answer, collective bargaining might tend to become a static process and a containing mechanism that would prevent the national development of joint dealings adequate to meet changing economic circumstances. Most unions conceive of collective bargaining as embracing all those subjects which affect employee welfare and security. They look upon collective bargaining as an expanding process.

Labor representatives at the 1945 Labor-Management Conference finally concluded that no list of subjects could possibly be formulated, for use in all plants and all industries, as definitive of the proper scope of collective bargaining. They noted the wide variety of traditions, customs, and practices that have grown out of relationships between unions and management in various industries over a long period of time" and pointed out that "the experience of many years shows that with the growth of mutual understanding, the responsibilities of one of the parties may well become the joint responsibility of both parties tomorrow . . ." This concept of collective bargaining found few "takers" in management ranks.

The idea that collective bargaining should be looked upon as an expanding process, gradually encompassing more and more subjects, is entirely unacceptable to many employers. Even those who are quite ready to recognize the inevitability, or desirability, of determining wages, hours, and the usual working conditions through joint negotiations refuse to accept collective bargaining as a growing process. Labor's philosophy is interpreted by management as reflecting a program for continuous union expansion into the field of management with "joint management of enterprise as the inevitable end." With the failure of the 1945 Conference to conclude an agreement in this area of conflict, industry demands for "management-security" legislation became insistent and will doubtless continue for many years to come.³⁰

As matters stand, collective bargaining covers not only subjects voluntarily dealt with in the labor-management

³⁰ In connection with management's right to manage, the Conference also explored the problems incident to unionization of foremen and supervisors. Contending that "no man can serve two masters," management insisted that it should not be required by law to recognize and deal with unions formed by supervisors. No agreement about organization of foremen was forthcoming at the Conference. Labor representatives felt "it would be inappropriate . . . to make any recommendation on the matter of unionization of foremen while cases involving this issue are pending before the National Labor Relations Board." Congress later supported the management position in this regard, by the Taft-Hartley Act, to the extent of denying foremen the benefits of government protection for their organizational efforts.

agreement but also those that the union is able to introduce against the will of the employer by an exercise of economic force. Employees thus have a strong voice under collective bargaining in determining what is proper management function. To this, management strenuously objects. Its objections may not be meaningful unless companies are able either to defend their position in a test of economic strength or to secure protection through legislation.

The defect of the legislative course is that designation of uniform, rigid limits to collective bargaining is quite incompatible with a system of cooperative joint dealing. There is but one way in which the dilemma can be resolved. Even though scope questions may be freely assigned to the arbitrament of work-stoppages, they cannot be satisfactorily resolved by such a procedure. Management-security questions are raised. The only sound way of extending the scope of agreements is by voluntary understanding as distinct from economic force. Whether unions will be willing and able so to restrain and direct the use of their power is one of the questions that may well be crucial in determining the efficacy of industrial self-government.

A third major clash of fundamental principles should be noted. Endeavors of the Conference to arrive at an understanding about how to settle work-jurisdiction disputes were wholly unsuccessful. Labor representatives freely acknowledged that parent labor organizations have an obligation to maintain effective procedures for resolving these disputes. They were willing to recommend that "those working on the job should continue to perform the work until a work-jurisdiction dispute is settled, and that pending such settlement there should be no interference with operations." Handling these questions has long been considered by the unions to be strictly an intra-union affair. The defect of that approach is its record of failure. National labor organizations lack "control" over affiliated or federated unions and firm agreements between these unions

for peaceful settlements of their disputes over jurisdiction have been among the most difficult of all understandings to consummate.

Management representatives wanted far more definite commitments about work-jurisdiction disputes than organized labor could give. Immediate promulgation of detailed procedures for finally deciding all work-jurisdiction disputes without any work-stoppages was the management program. Organized labor was asked to "develop, publish, and file with the National Labor Relations Board definite procedures under which such jurisdictional disputes can be finally resolved." The point-of-view that work-jurisdiction questions concerned only the unions was directly challenged in a formal way for the first time. Management proposed that no settlement of a work-jurisdiction dispute should (a) require the violation of the terms of an existing valid labor agreement, (b) make it incumbent upon the employer to use more workers than necessary to perform a job properly, (c) unduly increase the cost of production, or (d) impair the responsibility of management to direct the working forces. In other words, a demand for criteria, equitable to management and to the public, to govern the settlement of this class of disputes was introduced.

The previous discussion indicates that, as respects work-jurisdiction disputes, differences between labor and management were broadened and not narrowed as a consequence of Conference consideration. Customary habits of looking upon work-jurisdiction matters as solely the responsibility of labor were questioned. Management's interest in the actual terms of settlement were precisely staked out and so-called "feather-bedding" practices were closely linked with work-jurisdiction disputes.

Out of the failure of the Labor-Management Conference to meet certain long-term collective-bargaining problems, and these were included on the Conference Agenda, opposing lines were tightly drawn over three main issues. They were

over: (1) Proposals for modification of the Wagner Act and for increased government supervision of collective bargaining; (2) Management security; and (3) Work-jurisdiction disputes. Lack of agreement about any of these questions was a failure of far greater significance to the future of industrial relations than the inability of the Conference to devise machinery for peacefully settling labor disputes during the reconversion emergency.

A lack of common understanding between labor and management about the functions of collective bargaining and concerning the role of the government in industrial relations was starkly revealed. The great failure of the 1945 Conference was in its inability to resolve certain critical issues that had to be disposed of as a prerequisite to the satisfactory long-term development of collective bargaining. Government consequently assumed a responsibility for resolving these issues. Many features of the Taft-Hartley Act of 1947 directly reflect the failures of the Labor-Management Conference of 1945.

THE CONFERENCE IN RETROSPECT

It is entirely likely that the 1945 National Labor-Management Conference will go down in the annals of industrial relations as a meeting of lost opportunities. At a time when the country was insisting upon uninterrupted production, in order expeditiously to convert its resources from wartime to peacetime uses, labor and management were unable to arrive at a single, basic undertaking about what should be done by them to minimize industrial warfare after a breakdown of negotiations. Insistence upon retaining an uninhibited right to strike or to lockout failed to appraise properly the nature of the tasks ahead of the country in winning the peace. When 1946 strike statistics broke all previous records, the public by and large was ready to sell collective bargaining short.

The government had no practical alternative but to move

in and fill the gaps left wide open by the Conference. Fact-finding boards, plant seizures, and proposals for legislation were the devices employed by the government, over the opposition of either labor or management, when collective bargaining failed to produce an agreement. These procedural steps imposed by the government were a direct consequence of the failure of the Conference to seize the opportunity it had to work out disputes-settling arrangements satisfactory to labor and management. And, of course, the problem of how to minimize strikes after collective-bargaining failures remains as unfinished business on the desks of labor and management.

Another lost opportunity must be recorded. Inability of labor and management to reconcile their differences over Wagner Act amendments, management security, and jurisdictional disputes constituted a failure of voluntarism to produce results. A broad and a sweeping extension of government regulation over industrial relations was the consequence. The importance of collective bargaining was materially decreased while the scope of government control was correspondingly augmented. If a preservation of collective bargaining is essential to the development of sound industrial relations, and it undoubtedly is, the failures of the Labor-Management Conference of 1945 were serious in the extreme. Retrieving those failures is a major part of the task before those in labor and management ranks who would build industrial relations upon a sound collective-bargaining base.

Despite its failures, the 1945 Conference stands out as an important landmark in the history of industrial relations in the United States. This distinction arises not so much from positive results achieved—they were significant but altogether too few—but from the recognition given by organized labor and management to the proposition that collective bargaining can be consciously directed and developed by them into a more constructive institution. The road to

retrieving its failures was thus clearly charted by the Conference itself.

Knowledge of a new technique doesn't insure that it will be used. As a matter of hard reality, there is actually very little likelihood that labor-management conferences will be held in the near future to follow up and to build upon the groundwork laid in 1945. Legislation rather than agreement has become the focus of attention for the time being. So, the successes of the 1945 Conference have to be scored as intangible and potential gains. The time will surely come when the emphasis will shift back to voluntarism. Another opportunity will then be afforded to labor and management to use the successes of the 1945 Conference as a springboard to greater understanding and agreement.

Measured against the pressing needs of the postwar period, then, the 1945 Conference was a failure. Viewed in relation to the historical development of industrial relations, the Conference can be classed as a pioneering venture out of which came a highly important discovery. Putting that discovery to practical use has yet to be accomplished. With the sweeping extension of government regulation introduced by the Taft-Hartley Act, it is doubtful if collective bargaining will ever again be conceived as exclusively a private matter between labor and management. Recognition to public interests involved in collective bargaining has become a permanent factor in industrial relations. The big question is whether the public interests will be taken into account primarily by voluntary agreements between labor and management or by legislation. The conclusion seems inescapable that if collective bargaining is to remain the cornerstone of industrial relations, labor and management must assume a large responsibility for consciously developing this process with a proper regard for the public interest.

Chapter VI

GOVERNMENT-REGULATED COLLECTIVE BARGAINING

COOPERATION between management and organized labor throughout World War II was so effective that it raised high hopes for collective bargaining. There was a great confidence in 1945, prior to the labor-management conference, that organized labor and management would not only peacefully work out their postwar relationships but would do so with a minimum of government direction or compulsion.

A crucial test of the national labor policy established by the Wagner Act was at hand. Organizing for collective bargaining had not been completed in all areas or in all industries. In most of the major industries, however, unions were permanently established. Inauguration of sound bargaining relations was the next step. "Equality of bargaining power" was now to produce agreements without strikes and contribute to stable labor relations, if the faith expressed in collective bargaining was to be justified.

Criteria set by the public for successful postwar industrial relations were clear and simple. A minimum number of work stoppages and a reasonable regard for consumer interests in fixing the terms of employment were the main tests. These are exactly what the country has always wanted from the joint dealings of management and organized labor.

The country's hope that collective bargaining would turn out to be a highly constructive institution was expressed

most profoundly by President Truman when he convened the National Labor-Management Conference of November 1945.¹ Only now is it possible fully to appreciate how great the odds were against the success of that particular venture. Price controls and wage regulations were still in effect. They imposed highly restrictive limits upon the latitude exercisable in collective bargaining by both organized labor and management. The public need for economic stabilization clashed with the necessities of joint negotiation and made any no-strike agreement virtually impossible to secure.²

Whatever the cause, the failure of the 1945 Labor-Management Conference to devise peaceful means for settling disputes during the reconversion period, and the strikes which followed, constitute a major turning point in our nation's industrial relations. The Taft-Hartley Act is the tangible evidence.³

That Act is often referred to colloquially as a move to "cut down the power of organized labor" or as a program "to put labor in its place." Responsibility for the country's postwar labor difficulties was unquestionably assessed largely upon organized labor. Such comments are, however, among the more superficial observations to be made about the significance of the Taft-Hartley Act. More fundamentally, that legislation reflects a widespread public opinion that the government should direct and control industrial relations to a far greater degree than ever before seemed necessary.

Collective bargaining was sold very short. No longer did it seem so desirable for the government to go so far out of its way to encourage employee organization to enable joint

¹ See page 207.

² For a discussion of this point see page 208.

³ The official title of the Act is *Labor-Management Relations Act, 1947*. Sponsored by Senator Robert A. Taft and Representative Fred A. Hartley, Jr., the legislation was approved by Congress, vetoed by the President on June 20, 1947, and finally passed over his veto by the House of Representatives on June 21 and by the Senate on June 23.

dealing to get under way. Collective bargaining was not inherently necessary either for the worker or for the public interest. Congress also concluded that organized labor and management should not be left free to work out all their problems by their own devices. Over such a public appraisal, management has as great a concern—and as great a stake—as organized labor. Shifts toward regulated collective bargaining mean that both parties will have to conform to more governmental rules and regulations in the industrial-relations area than ever before. If the rules now seem to help one side and burden the other—well, that can change. Organized labor knew long ago that “what the government gives, the government can take away.”

The many factors that induced such a fundamental change in national labor policy need not be exhaustively treated here. Mention of a few factors will suffice to recall the temper of the times. The public had become very much “fed up” with a rash of strikes. Feather-bedding, jurisdictional disputes, and other impediments to full production were looked upon as irresponsible uses of union power in wanton disregard of the consumer interest. Mounting public discontent about the labor situation was accentuated by the cries of some union members for legislative protection against dictatorial practices engaged in by their own union leaders.

There were other complaints. Organized employers saw to it that the one-sidedness of the Wagner Act received a fulsome share of attention.⁴ Many of the employer claims seemed to be reasonable and equitable. Unions had come along so very far that the tremendous power amassed by labor organizations caused considerable apprehension. Fears of monopolistic control over jobs and of the possible use of organized labor’s power for noncollective-bargaining

⁴ Employers used the phrase “equality before the law” to epitomize their demand for a labor act that imposed similar obligations upon unions and management.

objectives resulted in demands for the most sweeping reforms of all.

A whole series of dissatisfactions about the state of industrial relations came to a head at the same time. These dissatisfactions were compounded by organized labor's adamant opposition to any kind of legislative program—an opposition soon recognized as a grievous error by some labor leaders. Demands for reform went far beyond amending the Wagner Act and changing the means of dealing with the organization of employees for collective bargaining. An entirely new national labor policy was enunciated.

That section of the Taft-Hartley Act that formulates the changed policy is, in many ways, the most significant part of the legislation.⁵ With overwhelming public approval, the government assumed a jurisdiction "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare" A broad government jurisdiction to prescribe and to proscribe was staked out. In consequence, government-regulated collective bargaining has supplanted free collective bargaining as the foundation of industrial relations in the United States.

Management has been prone to find altogether too much satisfaction out of the degree to which organized labor was held responsible for the introduction of government-regulated collective bargaining. The most important aspect of this policy is eclipsed by management's studied concentration upon the restrictions imposed on labor organizations. Yet even a casual reading of the Act shows that such restrictions were possible only because of the extension of gov-

⁵ Reference is to Section 1 (b) of the Labor-Management Relations Act, 1947.

ernment jurisdiction over the affairs of both parties. A sweeping transfer of many industrial-relations issues from around the bargaining table to the legislative hall, and to government bureaus, has been effected. This aspect of the Taft-Hartley Act overshadows the problems of the moment, pressing though they are. It is of even greater import than the manner in which certain issues have been resolved for the time being. Government-regulated collective bargaining is a new and untried venture in the United States.

No sweeping argument for *laissez-faire* should be implied from the designation of the national labor policy under discussion as essentially an extension of government's jurisdiction over industrial relations. A modern philosopher once said: "The trouble with *laissez-faire* was in its ambiguity about *who* was to leave *what* alone." Many aspects of our economic life have already been regulated in the public interest. As rights were abused, restrictions were imposed. Moreover, limits of tolerance over the abuse of private rights have undoubtedly narrowed with greater interrelation and interdependence of economic relationships. That has surely been true of industrial relations.

There should be no avoiding the disturbing fact, however, that government-regulated collective bargaining carries a restriction of the latitude and of the judgment exercisable by both labor and management in their joint dealings. This calls for serious thinking from those who look upon the preservation of relatively free collective bargaining as a strong bulwark for the maintenance of private enterprise and of our kind of democracy. How far can government regulation go without in fact superseding collective bargaining? The question is not academic. Once the Taft-Hartley Act was placed on the statute books, insistent demands for still more drastic regulations arose almost immediately.

An important new industrial-relations fact entered the picture in 1947. Government participation in and regulation of collective bargaining has been extended into areas

that lie far beyond the organizational preliminaries. Certain procedures applicable to both organized labor and to management in their joint negotiations are either directly specified by law or are to be promulgated by the National Labor Relations Board.⁶

Government jurisdiction even goes beyond the procedural steps in at least two important particulars. Certain provisions of the law are an attempt to limit the use of union power to collective-bargaining purposes. An example is the prohibition of union expenditures for certain political activities. Regulations respecting a number of substantive terms of employment have also been incorporated into the law. Contract terms relating to union security and welfare funds may be consummated only if they conform to a legally prescribed pattern. Differences between labor and management in feather-bedding or work-jurisdiction disputes are resolvable by what amounts to compulsory arbitration by a government board. Significant terms of the employment contract have thus been regulated.

Emphasis has just been given to those parts of the Taft-Hartley Act that extend the government's jurisdiction over industrial relations. In addition, the Act seeks to redress the balance of power between organized labor and management that obtained under the Wagner Act. Although rules governing employee organization were changed so materially as to constitute a drastic change of policy, they do not extend the pre-existing area of government jurisdiction. But they do raise numerous policy questions regarding the proper attitude of the government toward organizing activities of unions and of employees.

Along the lines of the preceding discussion, the complex Taft-Hartley Act can best be understood by grouping its most significant provisions into four main categories. Each

⁶ For reasons to be noted presently, beginning on page 277, decisions made respecting procedural questions can have a vital bearing upon the terms that emerge as the basis for settling issues in dispute.

one of them represents an important aspect of the changed national labor policy. The four categories are:

1. *Redress of the balance of power in industrial relations.*

A series of clauses largely reverse the previous national policy under which the organization of unions was facilitated and encouraged. Among many changes, equal assistance is now made available to employees who choose to refrain from organizing or who want to "de-certify" their bargaining representative. Union power to control or to discipline its members is curtailed, while individuals and minority employee groups are encouraged to set up working relationships that they desire.

2. *Restriction in uses of union power.*

A number of provisions were promulgated to control the uses that unions may make of the power amassed by them, usually with the assistance of the government. This is in marked contrast to the Wagner Act objective of encouraging employees to organize so they could better take care of their own interests in whatever way they might choose.

3. *Facilitating the agreement-making process.*

Negotiating procedures are placed under government control for the purpose of assisting, or placing pressures upon, organized labor and management to come to agreement without work stoppages. In other words, both parties are required to follow negotiating procedures prescribed by law as one aspect of government-regulated collective bargaining.

4. *Determination of substantive issues.*

Until the passage of the Taft-Hartley Act,⁷ organized labor and management were responsible for working out, through collective bargaining, every term and condition of employment. Under the changed policy, the

⁷ And except for the requirements of the wage stabilization program during the emergency of World War II.

government has jurisdiction over substantive terms of employment and has already exercised this jurisdiction as respects union security, welfare funds, feather-bedding and work-jurisdiction questions.

In the following discussion of each of the above subjects, attention is directed primarily to the probable impact of the national policy upon the ability of organized labor and management to work out a stable industrial relationship. Scarcely mentioned are the collective-bargaining failures and the abuses of union power that provoked the government regulations in question. This approach has been taken because of a conviction that the regulations cannot be justified solely by reference to the provocations that brought them into being. An appraisal of the workability and practicability of the national policy is much more to the point. The policy will ultimately be judged in such terms.

As a matter of fact, a Joint Congressional Committee to concentrate upon making such a judgment has already been set up under terms of the Taft-Hartley Act itself.⁸ Because of the importance of the function assigned to this Committee, a brief analysis of its task follows the discussion of the four categories into which the principal terms of the Taft-Hartley Act have been grouped.

REDRESS OF BALANCE OF POWER IN INDUSTRIAL RELATIONS

American industry successfully urged in 1947 that, under the Wagner Act, many aspects of the government's policy in fostering the growth and the power of organized labor were socially undesirable. Its representatives insisted that "equality of bargaining power" had not been achieved. They argued that many unions actually possessed enough power to dispense with bargaining and to impose their own inequitable terms of employment. Such a situation was

⁸ Sections 401 to 407, inclusive, provide for this Committee.

vividly pictured as inherently unfair to industry and detrimental to the interests of the whole country. Wage increases secured by unions were said to be the principal cause of price increases, which were developing serious inflationary implications. A great body of public opinion soon supported the idea of changing the one-sided Wagner Act and of redressing what appeared to be an inequitable balance of power in industrial relations.

The Wagner Act unquestionably augmented the power of labor unions. Whether the law actually gave unions an excessive bargaining power over the employers is a highly debatable question. Positions taken will vary widely, depending upon the standard used in classifying the aims of the labor movement between "legitimate" and "improper" objectives.⁹ Commonly overlooked in the argument, moreover, is the fact that a substantial improvement in employment terms since 1937 came principally from the "good business" conditions that prevailed. Competitive bidding by employers for scarce workers was not caused by the Wagner Act.

There was an almost universal tendency in 1947 to overlook the main source of the real power of labor unions. It was economic. A shortage of manpower at a time of virtually unlimited demand for goods, almost regardless of price, gave even unorganized employees an opportunity to secure greatly increased wages. Wage trends in many service trades are strong evidence of this situation. Under such circumstances, labor unions possessed a strong bargaining position quite apart from any governmental assistance in their organizational activities.

A rebalancing of the Wagner Act was nevertheless decided upon. It was deemed inappropriate for the government any longer to give preferential assistance to the organization of unions. Labor organizations seemed to be quite capable of holding their own without having the government

⁹ For a discussion of this subject see pages 63 to 66.

as an ally. One possible way of effectuating such a change in policy would have been to repeal the Wagner Act. That course was neither practical nor desirable. In addition, the objective was not merely to withdraw government assistance to unions. The power possessed by unions was to be cut down.

Nearly everyone agrees that the industrial election, as developed under the Wagner Act to resolve representation questions, should be preserved. Experience has shown convincingly that the election device serves the cause of industrial peace well by minimizing organizational and recognition strikes. And it certainly wouldn't have been reasonable to invite a reinstitution of former employer practices, long designated as unfair and indefensible, to combat the organization of unions. Restrictions against unfair labor practices by the employer had to be continued as a practical matter. They could be accompanied, however, by restrictions upon the organizing activities of unions and the use of certification regulations less protective of union status. So-called even-handed regulation of union organization would then be the government policy, rather than one-sided encouragement of union organization. In some ways, a repeal of the Wagner Act would have been less burdensome to the unions.

One particular characteristic of the Taft-Hartley program to regulate the organization of unions is highly significant. Great stress is laid upon protecting the rights of the individual employee and of minority groups of employees to stay out of any particular union. That is apparently conceived as anti-monopoly legislation. There is a widely held misconception that large numbers of employees, perhaps most union members, joined labor organizations either because they were forced to do so against their will, or because of the lack of machinery for stating their real preferences, or because of Wagner Act restrictions upon employer expression that prevented employees from knowing both sides of the

case. The factors mentioned undoubtedly played a part in many union-organizing campaigns, but their importance is exaggerated. With one exception, regulations promulgated to protect the individual and the group right of self-determination cannot be opposed on any reasonable grounds.

The one exception is basic. It relates to the proper representation unit. What is the appropriate grouping of employees for determination of a bargaining representative on a majority vote basis? Do individuals and minorities have to go along with the majority on a craft, plant, company, or industry basis? One's concept of the functions of collective bargaining will dictate answers. Protection of individual rights may deprive the majority of its wishes if the proper unit of representation is erroneously conceived. Encouragement of and assistance to self-determination by small groups of employees will tend to cut down the job control and monopolistic power of many unions. That kind of program can conceivably effect a redress of economic power. Stabilization or standardization of working conditions within plants and between competing plants would then be less likely to be achieved.

The above considerations have an important bearing upon the steps taken to redress the balance of power between organized labor and industry. Employers are encouraged to express their views about unionism without danger of being penalized. This action was long overdue.¹⁰ Unions are precluded from coercing employees to join up.¹¹ No fundamental objection to that measure has been voiced. The right of small groups of employees to exercise their self-determination rights has been accorded an unusual protec-

¹⁰ Section 8 (c) of the Taft-Hartley Act provides that "The expressing of any views, argument or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Although employer expressions may not constitute an unfair labor practice, they may be held to invalidate an N.L.R.B. election among employees to determine a bargaining representative.

¹¹ By Section 8 (b) 1 of the Act.

tion, and this is the nub of the Taft-Hartley Act program to redress the balance of power between organized labor and management.

Many new regulations relating to employee organization have been promulgated to effectuate the new point of view that supporters describe as a return to unionism "by the consent of the governed." Craft unions have a much better chance of being selected as certified bargaining representatives¹² and independent unions must be accorded the same assistance as C.I.O. or A.F. of L. affiliates.¹³

Since it is made easier for employees to change their bargaining representative, a "dominant" union in a plant or an industry will presumably be less able to maintain its position. Implicit approval has been given to a system of collective bargaining carried on by more than one union within a plant or an industry. At least, government assistance is made available for the creation of that kind of system. Complete control of jobs by one union as a means of stabilizing working conditions under one program is a basic objective of the labor movement. The government's weight is thrown squarely against attainment of that objective by the support made available for self-determination by small groups of employees.

Intensified competition between labor unions in their organizing activities and, consequently, more costly terms of employment demanded by unions are concomitants of the collective-bargaining system contemplated by the Taft-Hartley Act. Dual unionism and an inducement for unions to make demands to attract employee support are among the expectable consequences of the multi-union system. They have been appraised, for the time being at least, as the "lesser evil" in comparison with the concentration of power in the hands of a dominant union.

Not every employer is going to feel that the way selected

¹² See Section 9 (b) (2) of the Act.

¹³ By the protection afforded in Section 9 (c) (2).

for redressing the balance of power is a happy one. Dissidents will include those employers who have long dealt with unions on an industry-wide basis and who have been "sold" on the stabilizing benefits that accrue from that type of joint dealing. Other employers will wonder whether or not the steps taken to cut down union power are all they were "cracked up to be." Doubts will arise when organizational drives are renewed as rival unions contest for the favor of the employees and if consequent steep increases in demands are made in a union effort to hold the support of employees.¹⁴ The Taft-Hartley Act has numerous anti-industry characteristics.

There is a possibility, of course, that such risks will not mature at all for some concerns. Employees may turn their backs on collective bargaining altogether and decide to return to individual bargaining. This contingency is carefully provided for by the Taft-Hartley Act. Employees who want to make such a move are entitled to government assistance in attaining their desires.

The right of employees to refrain from self-organization is given the same status and protection before the law as the right to self-organization.¹⁵ In contrast to the Wagner Act provisions, organization for collective bargaining is not to be particularly encouraged as socially desirable. It is not looked upon as a prerequisite to getting industrial relations on a stabilized basis. It might even be fairly said that the underlying philosophy of the Taft-Hartley Act is that, from the standpoint of the general welfare, it is quite immaterial whether employees join unions or not. Of paramount importance in this philosophy is full protection of the representation desires of small groups of employees, even at the

¹⁴ In some recent discussions, for example, union attention was given to the possible usefulness of retirement plans in which pensions are paid only to those union members who retain their good standing in the union.

¹⁵ Section 7 specifies but one exception. That is when union membership is required to carry out the terms of a union-shop arrangement made in conformance with Section 8 (a) (3) of the Taft-Hartley Act.

expense of collective-bargaining effectiveness possessed by unions.

Through the section of the Taft-Hartley Act entitled "Rights of Employees," the government takes on the job of preventing a labor organization from exercising improper pressure against employees in securing all their various rights of self-determination guaranteed by the Act.¹⁶ Protection of individual workers and minority groups of employees against union control goes even further. The extent to which union members may be "disciplined" by the union of their choice is thoroughly limited by the regulations on union security. For all the attractiveness of the objective, one should frankly face the fact that this may also hinder development of a program desired by the majority of the employees and tends to weaken the bargaining strength of the union.

A union shop may be instituted by agreement between a union and management, but only if previously approved by a majority of the employees in a bargaining unit.¹⁷ Under the prescribed union-security clause that can then be agreed upon, an employer may not discharge any employee except for his failure to tender periodic dues and initiation fees uniformly required of all union members. The power and discipline exercisable by a union over individual members not in sympathy with a union policy is thus substantially restricted.¹⁸

Union security has thus been sacrificed in the interest of preserving the right of particular employees, or of minority

¹⁶ Section 7, entitled "Rights of Employees," guarantees the "right to refrain" in a general way. This right will be defined through National Labor Relations Board administration of the "Unfair Labor Practices" enumerated in Section 8.

¹⁷ In conformance with the terms of Section 8 (a) (3).

¹⁸ Employees may also elect at any time, during the term of a labor agreement, not to be represented by the certified union in bargaining over a grievance. Any individual employee, or a group of employees, may choose to present their own grievances to the employer. This right, guaranteed by Section 9 (a) of the Taft-Hartley Act, diminishes the need for employees to join a certified union.

groups, not to go along with the program of the majority in a plant. One of the objectives, and unquestionably a meritorious one, is to prevent abusive or discriminatory treatment of union members by trade union officials. But the power and the programs of all unions are adversely affected even though most of them have been run along "democratic" lines. No union may assign bad standing to a member, and thereby cause his discharge. The nature of the step taken can only be understood in view of the general purpose to curtail union power. At any event, the ability of many unions to meet their commitments under labor agreements may have been cut down and the institution of labor unionism accordingly weakened.

Underlying purposes are made even clearer by the form of union insecurity that was introduced. As noted previously, employees are entitled to government assistance in changing their bargaining representative, even though dual unionism is thereby introduced.¹⁹ They can secure similar aid in decertifying the union that has been representing them, even though that means a return to individual bargaining.²⁰ A certification is "good for a year," but after that time, changes in the industrial relationship may be made with government assistance, if not encouragement, even though a return to individual bargaining results.

Government assistance is equally available, then, for employees either to organize for collective bargaining, to organ-

¹⁹ Reference is to Section 9 (b), which requires the National Labor Relations Board to designate the unit appropriate for collective bargaining in such a manner as to effectuate the guarantee to employees that they may freely exercise their rights of self-determination. The section specifically prohibits the Board from deciding that any craft unit is inappropriate on the ground that a different unit was established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.

²⁰ Machinery is provided in Section 9 (c) whereby the employees or an employer or any individual may secure a determination by the National Labor Relations Board of a claim that a labor organization, certified by the government, or recognized by an employer, no longer represents a majority of the employees.

ize dual or competing unions,²¹ or to decertify a labor organization that has been representing them. The philosophy of the Wagner Act is rejected. Under the prevailing philosophy, it is at least a matter of complete national indifference whether employees organize for collective bargaining or do not. An even more drastic interpretation is possible. There seems to be some hope that employees, by and large, will refrain from choosing union membership, at least to the extent of preventing any union from securing a monopolistic control of jobs.²²

Under the Wagner Act, the National Labor Relations Board had a duty to encourage and to assist the organization of unions. Its administrative rules were geared to this objective.²³ In order to assure that old practices and procedures would not carry over, and thereby thwart the purposes of the Taft-Hartley Act, a number of important changes were made in the government agency responsible for administering the basic labor law. Since these changes are closely related to the objective of redressing the balance of power in industrial relations, they should be briefly noted.²⁴

²¹ In addition to the new protection given employees who desire a craft unit for representation, the Taft-Hartley Act offers assistance to employees who desire to form an independent union. In Section 9 (c) (2), the Act provides that "In determining whether or not a question affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the relief sought. . . ." A decision on a representation question must be based upon the desires of the employees involved irrespective of whether or not the result is deemed by the Board to further the cause of stable collective bargaining.

²² The framers of the Wagner Act assumed that the great majority of employees wanted strong unions. The framers of the Taft-Hartley Act banked upon the conviction that a sizeable minority of employees do not want to subordinate their individual interests to a union program.

²³ The conviction is rather generally held that the old Board "went too far" in encouraging organization and excessively trespassed upon employer rights.

²⁴ For example, run-off elections were formerly held between two unions if their combined vote was greater than the vote for "no union." Under the Taft-Hartley Act, if none of the choices receives a majority vote, the run-off election is to be between the two choices for which the larger number of votes were cast, even though that puts a "no union" choice on the run-off ballot. This procedure is required by Section 9 (c) (3) of the Act.

A principal complaint about the work of the old Wagner Act Board was over the combination of prosecuting and judicial functions in one agency—especially one charged with the duty of encouraging the formation of unions. The two functions have now been separated. A General Counsel acts as investigator and prosecutor. The Board sits as a quasi-judicial body to apply the law.²⁵ Presumably to make sure of accomplishing the shift in policy from encouraging union organization to an “even-handed” regulation of the process, rulings of the National Labor Relations Board are subject to a unique kind of judicial review not imposed on any other administrative agency of the government.

Findings of fact are subject to court review. Facts developed by an administrative board composed of experts in the field are customarily held to be conclusive.²⁶ An unusual loss of confidence in the Wagner Act policy is revealed along with a fear that the National Labor Relations Board would not be able to reverse its approach. Throughout the revision of the rules for union organization, an iron determination to eliminate the pro-union one-sidedness of the earlier national labor policy may be discerned.

Careful examination of the Taft-Hartley Act reveals, therefore, an about-face in national policy as respects supervision over the organization of employees for collective bargaining. It is now considered immaterial to the national well-being whether employees organize or refrain from doing so. No longer is it the function of the government to encourage and facilitate the organization of unions as a matter of sound social policy. On the contrary, employees are to be assisted as much in their efforts to disband a union as in their

²⁵ Reorganization of the National Labor Relations Board was made by Section 3 of the Taft-Hartley Act. Membership of the Board was increased from three to five members, who, with their legal assistants, are responsible for evaluating the charges brought.

²⁶ A part of Section 10 (e) of the Taft-Hartley Act reads, “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive.” A similar statement is incorporated in Section 10 (f).

efforts to create one. Employees are also to be protected in their right to set up numerous and competing representation units, even though a system of multi-union bargaining runs counter to the pattern of organization that is the long-established goal of the labor movement.²⁷ Monopoly power of unions is to be cut down by assisting employees in efforts to bring about dual unionism and a return to individual bargaining.

Putting control over their labor organizations back into the hands of the employees "where it rightfully belongs" has been an appealing rationalization for the program to redress the balance of power.²⁸ There is merit to the idea that the labor movement and its objectives should be voluntarily supported by employees if sound unionism is to be developed. Logic also supports the notion that, if the labor movement is unable to persuade employees to acquiesce in its program, no government support should be given to that program.

On the other hand, sound collective bargaining and stable industrial relations will not come from an all-out preservation of the self-determination rights of employees without any regard at all for the concomitant obligations of em-

²⁷ The need of employees for a strong and a dominant union in each industry does receive passing attention in certain words of Section 1 of Title I of the Taft-Hartley Act. The words are: "The inequality of bargaining power between employees who do not possess full freedom of association and employers . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." (Italics supplied.) This section is a carry-over from the Wagner Act. Organization of unions capable of following such stabilizing objectives is not furthered, however, by the emphasis placed in the Taft-Hartley Act upon the creation of dual and competing units or upon a possible return to individual bargaining.

²⁸ Accountability of a union to its members is also required. By the terms of Section 9 (f) of the Taft-Hartley Act, one of the prerequisites for a union to secure any benefits under the Act is the furnishing of a complete financial report to all members. Most unions have long done so, but the requirement is of value in insuring that other unions follow sound, established practices.

ployees toward collective bargaining and toward the labor movement. What do employees have to give up to secure the benefits of collective bargaining? This aspect of the problem receives scant attention under the Taft-Hartley Act.

A high price may be paid for the national policy of the Taft-Hartley Act if it does succeed in reducing the power of unions by filling the industrial-relations scene with competing unions and jurisdictional disputes. High production will not be assisted by constant uncertainty over whether a collective-bargaining agreement is only a temporary expedient. The policy may also give presently unanticipated results if, sometime in the future, creation of numerous bargaining units in an industry, or the elimination of collective bargaining, accentuates a downward spiral of wages and labor standards.

Government regulations of the union-organizing process now existing were worked out when business was good and when jobs were plentiful. Under these conditions, stabilization of working conditions between competing plants doesn't appear to be so vital. Because union power reached its peak during the "good times" since 1937, unionism now appears to be much more of an offensive than a defensive weapon. In no small measure, the degree of success or failure of the government venture in regulating the organization of unions along the lines of the Taft-Hartley Act will depend upon the fluctuations of the business cycle.

RESTRICTIONS ON USES OF UNION POWER

In the preceding section, those parts of the Taft-Hartley Act that can be designated as "modifications of the Wagner Act" were analyzed. These provisions constitute the program for eliminating the one-sidedness of the earlier legislation. Other provisions of the Taft-Hartley Act are essentially different. They don't modify the Wagner Act. They extend

government jurisdiction into areas of industrial relations not previously regulated at all. One of these areas is regulation of the uses of union power.

Government assistance had been previously accorded to the organization of unions on the assumption that while the increased power of employees might be applied in various ways, its principal use would be for collective-bargaining purposes. No assurances about this were sought. There could be no misconception about the certainty, moreover, that the labor movement would engage in numerous non-collective-bargaining activities, including politics. It always had. The Wagner Act policy was to assist employee organization so that all the various activities of the labor movement for self-improvement would be more effective. The "big" program, however, would be collective bargaining.

Union power can be devoted to many ends. It can even be used to weaken collective bargaining and to further class conflict. A strong union can also seek unilaterally to impose its terms upon the employer. Policies that accentuate industrial conflict and create instability can be pursued just as avidly by unions as by employers. When the government took on the job of assisting union organization, deliberately to increase the power of employees, it was inevitable that sooner or later a call would be made upon government to control or to regulate the power it helped to bring into being. That call would come most insistently when any union "grossly misused" the power it had secured with government assistance.

Unions had greatly abused their power, and the government had better clean up the mess it had created by passing the Wagner Act—that was the theme of many cries for reform in 1947. In response, certain provisions of the Taft-Hartley Act were devised to limit the use of union power primarily to purposes of collective bargaining as defined by Congress.

Various and scattered parts of the legislation fall in this

category. Included are those sections in which the government refuses to assist the formation of or give support to Communist-dominated unions. Others proscribe certain political activities. In addition, particular uses of union economic power were banned by the outlawing of certain organizational strikes, boycotts, and work-jurisdiction strikes. As will presently be noted, these various regulations add up to the inauguration of government regulation over unions.

Non-Communist Affidavits

Why should the government actively assist the formation, or protect the status, of those labor organizations whose leaders are presumably opposed to collective bargaining and dedicated to the creation of class conflict and revolution? Should a national policy designed to further collective bargaining support organizations seeking the collapse of collective bargaining? Answers don't seem very difficult to make. The obvious answers, unfortunately, don't entirely dispose of the matter. Definitions of Communism vary. So do definitions of "genuine" collective bargaining. Attempts to deprive Communists of certain rights always get tangled up with the problem of not infringing upon other rights at the same time.

The labor movement has long been aware of the disruptive consequences that follow Communist infiltration into and control of a union. Union leaders have long been a principal target for the most violent brands of Communist abuse. Nor is this fortuitous. Among the defenders against the corroding influence of Communist tactics and programs, in this and in other countries, labor leaders are in the first line. On the record of their performance, practically all labor leaders can confidently be counted upon implacably to oppose Communist domination of unions.

As to the effectiveness of union-leader opposition to Communist infiltration there is no unanimity of opinion. Con-

gress deemed it appropriate in 1947, therefore, to withdraw all government support from labor organizations that failed to give prescribed assurances that their leaders were not Communists. Before a union can secure any benefit from the Taft-Hartley Act, each officer must file an affidavit stating "he is not a member of the Communist party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

This requirement is particularly obnoxious, say some union leaders, because it is one-sided. Employers should also be required to file a similar affidavit, they maintain, in order to qualify for benefits under the Act. Other labor leaders look upon the affidavit requirement as a sort of personal insult in view of their record of anti-Communism. But most union officers who can sign the affidavit have done so, because the requirement is not difficult to fulfill and their unions don't want either to be suspect or to lack status.

On logical grounds and as a matter of principle, it is difficult to object to the affidavit requirement in itself. No more than a reasonable requirement has been made as a prerequisite for enlisting the aid of the government in support of a labor organization. The roots of the controversy go far deeper. Unions have been asked, for the first time, to accept a form of government regulation of their organizations as a *quid pro quo* for government assistance. Discriminatory treatment is specified for unions that do not accept government regulation. Whether or not there is to be government regulation of the labor movement or free unionism is viewed as the underlying issue in some labor circles.

Whether the new regulation was called for in the interests of national security to an extent that justifies raising the "free unionism" issue is debatable. And only time will tell whether the regulation in question induces employees to turn out those leaders who are unable to sign the affidavit.

If such results do obtain, then the government policy will have attained its main objective. Meanwhile, labor organizations that do not qualify will be dependent solely upon the use of their economic power for the attainment of recognition and status. No particular restraints have been imposed upon strikes by nonconforming unions to secure recognition, redress of grievances, or economic gains. Some employers may be called upon to carry a heavy cost, in plant shutdowns, as a consequence of placing on the "unfair list" those unions whose officers cannot or will not sign the non-Communist affidavit.

Quite apart from such operating problems as may be created, the non-Communist affidavit represents but one aspect of the national policy by which the government regulates and directs the use of union power.²⁹ Opposition to such regulations in their entirety doubtless accounts for the refusal of unions, like the United Mine Workers and the United Steelworkers of America, to go along with the non-Communist affidavit requirement. These unions are in business primarily to engage in collective bargaining. They vigorously oppose Communism, but they reject the principle of government-regulated unionism, even as a method for forestalling the growth of Communist influence. A deep-seated fear exists that the control over unions may go much further.³⁰

²⁹ Discussions of other phases of regulations over union power follow immediately.

³⁰ The registration of unions required by Section 9 (f) of the Taft-Hartley Act is sometimes pointed to as evidence of a further tendency toward government-regulated unionism. No benefits can be secured by any union under the Act unless it registers with and supplies certain information to the Secretary of Labor. Mention may also be made of the power given to the National Labor Relations Board, under Section 8 (5), to determine whether initiation fees are "excessive or discriminatory." In the case (*N.M.U. vs. Herzog*, 48 ALC 1164) the Supreme Court upheld the constitutionality of the requirement that unions file financial reports and other data with the Secretary of Labor. The union in this case had not met these requirements, so the Court found it unnecessary to rule upon that aspect relating to the constitutionality of the non-Communist affidavit sections of the Taft-Hartley Act.

Political Contributions

One of the most controversial provisions of the Taft-Hartley Act declares it unlawful for "any labor organization to make a contribution or expenditures in connection with any election at which Presidential electors or a Senator or Representative . . . are to be voted for . . ." ³¹ Any officer of a union who consents to such contribution or expenditure is subject to fine and imprisonment. Underlying this regulation, apparently, is an intention to restrict union activity largely to collective bargaining.

Demands for limiting the power of unions actively to participate in political campaigns may be variously explained. The most cogent argument for some regulation was built upon the inequity of requiring all members to pay a union-leveled assessment,³² on behalf of a particular political party, regardless of the political convictions of individual members. There are valid reasons, in our kind of democracy, why a minority within a labor organization should not be required to support the political aims of the union majority. Assessments of the type mentioned have been widely appraised as "out of order." Unionism implies collective control of jobs; it has not encompassed collective control of political convictions.

But the ramifications get to be complex when remedies are proposed. Should the power of a labor union, then, be exercisable not at all in the political field? Almost everyone will agree that labor organizations can, or certainly will, seek to advance the interests of their members both by economic and by political activity. The underlying issue over political expenditures concerns the introduction of government supervision over the political activities of unions. Such regulation has seemed necessary to some persons in

³¹ Section 304 of the Act.

³² Nonpayment of the assessment might have resulted in the loss of a job under those union-security clauses that made continued "good standing" in the labor organization a condition of employment.

order to furnish protection against the contingency that organized labor may attain a political power disproportionate to its national importance.³³ In many ways, these questions are among the most controversial and fundamental problems raised by passage of the Taft-Hartley Act.

Restrictions were placed upon labor's political activities by the very Act that transferred important industrial-relations issues from the economic to the political arena. Only through political activity—as distinct from economic pressures—can organized labor secure a changed treatment of these issues. Yet any labor organization “which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work” is legally restrained from making any contribution or expenditure in connection with major political elections.³⁴ Some observers have concluded, and not in any cynical sense, that the ban on political activity was intended to give finality to the determinations made in the Act and to avoid “retaliation” by the unions against those who supported the legislation.

The ban placed on political “expenditures” by the Taft-Hartley Act is stated in highly restrictive terms. It would deprive unions of virtually any organized voice in the principal political elections. Many doubts have been expressed about the constitutionality of such a sweeping restriction. Certainly, if union publications are banned from editorializing on the relative merits of candidates for office, the ban on political activities would include a restriction upon the freedom of the press.³⁵

³³ In passing the Taft-Hartley Act over the President's veto, with votes to spare, Congress provided the strongest kind of evidence that labor unions, in 1947 at least, did not possess any power to dictate in the political field.

³⁴ By Section 304 of the Taft-Hartley Act.

³⁵ A challenge of this part of the Act was made, almost immediately after passage of the Act, through expenditure of C.I.O. funds to print, in a local newspaper, Mr. Philip Murray's support of Magistrate Edward A. Garmatz for election to the House of Representatives from Baltimore, Maryland. In February 1948, a Federal grand jury indicted Mr. Murray for alleged

Despite the attempt to restrict union activity to collective bargaining, the labor policy introduced by the Taft-Hartley Act cannot fail to induce a greater emphasis upon political activity by the labor movement. Major industrial-relations issues formerly settled exclusively at the negotiating table have been determined, for the time being at least, by legislation. Not economic power but political power is the key to securing changes in these terms of employment. How the unions can meet this situation while guarding against any infringement of the individual right of their members to political freedom is still an unsolved problem.

Restrictions on Use of Union's Economic Power

Government support and assistance is now withheld from unions whose officers cannot or will not file the so-called anti-Communist affidavit. And unions are not permitted to exercise their full power in the political field. Government-regulated unionism does not stop with these provisions. Restrictions are also placed upon the use by unions of economic strength to resolve a number of disputes more or less directly concerned with employer-employee relationships.

Economic power possessed by labor organizations can be freely directed ³⁶ against an employer to back up most de-

violation of Section 304. On March 15, 1948, the U. S. District Court, District of Columbia, dismissed the charges against Mr. Murray. It was decided that the constitutional power of Congress to regulate federal elections may not be exercised to restrict the freedoms guaranteed by the First Amendment to the Constitution. As respects the use of union funds for political objectives not in accord with minority views, the Court observed that "Inherent in the idea of collective activity is the principle that it shall be exercised on behalf of the organization pursuant to the will of the majority of its membership." In June 1948, the Supreme Court ruled on the case without passing a judgment upon the constitutionality of the ban on political expenditures by unions (*U. S. vs. C.I.O.*, 48 ALC 1164). The indictment against Mr. Murray was dismissed on the ground that the acts in question did not violate the statute, which does not prohibit use of union funds for publishing and circulating newspapers in regular course to members and purchasers.

³⁶ Not entirely free, however, for it must be channeled through the procedures required by the law of both unions and management. For a discussion of procedural regulations see pages 277 to 308

mands for improved working conditions.³⁷ But a number of specific uses of economic power against employers are prohibited. It has been made an unfair labor practice³⁸ for a union to strike or to refuse to handle or work upon goods for the purpose of (a) forcing an employer or self-employed person to join a labor or employer organization, (b) compelling an employer to cease using the products or services of any other person, (c) requiring some other employer to recognize or to deal with an uncertified labor organization, (d) compelling any employer to deal with a particular labor organization if another labor organization has been properly certified under the Act, (e) putting pressure on any employer to assign particular work to a certain labor organization or to a certain craft, trade, or class of employees rather than to those in other categories, (f) to attempt to cause an employer to pay or deliver any money or thing of value for services not performed. The use of secondary boycotts for any purpose is proscribed and the right to strike for certain objectives has been restricted.

Many logical reasons can be advanced to show why labor organizations should not engage in the proscribed activities. Instances of abuse can be cited to explain the need for each regulation. Whatever advantages may be gained, we have embarked upon an extensive program of regulation over union activities in the field of industrial relations. That is such a marked reversal of the policy of free unionism, previously supported by the government, as to call for a careful examination of the advantages and the disadvantages of regulated unionism.

Use of its economic power by a union, either through

³⁷ There are several exceptions. Demands cannot be made upon the employer for union-security provisions of welfare-fund terms that do not conform with the specifications of the Act. Nor may strikes be called to secure feather-bedding provisions or to settle work-jurisdiction disputes. For a discussion of the significance of the extension of government regulation over these substantive terms of employment, see pages 308 to 327.

³⁸ Section 8 (b), Paragraph 4, Parts A, B, C and D, and also Section 8 (b), Paragraph 6.

strike or boycott actions, to compel an employer to meet a number of the demands listed above has not only been designated as an unfair labor practice but also as an unlawful act giving an injured person the right to sue for damages.³⁹ Double sanctions and double penalties are available whenever the proscribed industrial-relations activities are engaged in by a union. A stern determination to regulate these union activities with a heavy hand is implicit.

As noted above, secondary boycotts are "out," irrespective of the situation which the union may seek to remedy. It is unlawful for a union "to engage in, or to induce or encourage the employees of any employer" to strike or to refuse to handle or to work upon goods or to refuse services in order to force the employer to cease doing business with any other person. Experience had shown that secondary boycotts tend to injure parties not involved in a labor dispute to a greater extent than those directly concerned. On the other hand, the boycott was a union weapon of proven effectiveness. There can be no doubt that the ability of labor unions to achieve their objectives is lessened by the elimination of a principal method for improving the terms and conditions of employment.

In deciding that an exercise of the strike weapon for certain purposes is "out of bounds," Congress was dealing with essentially different factors from those encountered in banning secondary boycotts for any purpose. Specific industrial-relations issues and problems were affected directly when the right to strike for certain *purposes* was banned. If economic force can no longer serve as the final arbitrament, some other means must be substituted for deciding the

³⁹ Section 303 (a) of the Taft-Hartley Act lists the union activities mentioned in Section 8 (b), Paragraph 4, Parts A, B, C, and D, as "Boycotts and other Unlawful Combinations." Anyone injured in his business or property by reason of any violation of Section 303 (a) "may sue therefor in any District Court of the United States . . . and shall recover the damages by him sustained and the cost of the suit." One exception of this double penalty may be noted—the anti-feather-bedding clause, Section 8 (b), Paragraph 6, is not repeated in the list of "unlawful combinations."

disputed issues. Employer interests are affected by whatever alternative methods for settlement are prescribed.

Compulsory arbitration, in one form or another, has become an integral part of the national labor policy because of the proscription against strikes to resolve certain disputes. For example, determination of representation questions by the National Labor Relations Board ⁴⁰ have been given finality. At least, they cannot be changed by a strike. No very logical objection to this provision can be raised. An employer is legally required to deal with a union certified by the National Labor Relations Board. He could be, and frequently was, subjected to a strike to compel recognition of another, noncertified union. Economic force was used by a union in an attempt to compel an employer to violate the law. If an employer can be legally required to deal with a particular union, in order to further the cause of collective bargaining, it is entirely reasonable to require unions similarly to abide by the National Labor Relations Board certification.

The Taft-Hartley Act has made a National Labor Relations Board ruling on a representation question equally binding upon management and all unions. The incongruity of an "arbitration" decision binding only upon the employer is thus eliminated. This is unquestionably a valid extension of the arbitration principle even though it does entail a restriction upon the right to strike.⁴¹ Such a result is a natural corollary of the legal requirement upon employers to recognize a union certified by the Board.

Compulsory arbitration, following restrictions of the right to strike, has been extended in a somewhat different manner as a result of the outlawing of work-jurisdiction strikes.

⁴⁰ When made under Section 9 of the Taft-Hartley Act.

⁴¹ It may be noted that the election among employees to determine the bargaining representative has largely shouldered out the organization strike. One may logically appraise the industrial election as an adaptation of arbitration principles to the settlement of an issue formerly considered to be nonarbitrable.

The National Labor Relations Board is empowered and directed ⁴² to hear and determine work-jurisdiction disputes, unless the parties themselves work out a voluntary adjustment of the dispute within ten days after the filing of a charge. Salutory results from this provision may be expected only if the parties affected by jurisdictional disputes voluntarily create their own settlement machinery. That is the only sure way of avoiding the risks of compulsory arbitration.

Creation of effective machinery for the voluntary disposition of work-jurisdiction disputes should be encouraged by the provisions just described. After all, work stoppages to settle union-jurisdiction issues are commonly recognized, even by most labor leaders, as unnecessary and undesirable actions. Unions and the employers now have a tremendous incentive to avoid such stoppages by developing their own procedures for settlement. One notable and constructive result of the Taft-Hartley Act was the establishment, as of May 1, 1948, of the National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry. Created by the employers associations and the Building Trades Department of the American Federation of Labor, the Joint Board is for the voluntary arbitrations of work-jurisdiction disputes.

In a very real sense, compulsory arbitration of jurisdictional disputes under the new Act may be looked upon as a penalty imposed upon organized labor for failing to meet its obvious obligations. The trouble is that management also shares the penalty. Management remains "in the middle," just as it did when work-jurisdiction strikes were not outlawed.

It is not easy to understand why the Taft-Hartley Act program for avoiding stoppages over work-jurisdiction disputes should be viewed so favorably by employers. A gov-

⁴² Under Section 10 (k) of the Taft-Hartley Act.

ernment board has been assigned the task of allocating disputed work between contesting crafts or trades. Actions taken by the Board will fix labor costs and, sometimes, the production methods that go along with certain crafts. To most employers, that prospect would seem to be mainly on the unalluring side. Some solutions of work-jurisdiction issues through compulsory arbitration will likely turn out to be just as burdensome to the employer as jurisdictional strikes themselves.

Avoidance of compulsory arbitration for settling feather-bedding issues will not be as possible to achieve as in the case of work-jurisdiction disputes. The parties have no right to set up their own machinery finally to settle the "make work" issues. A definition of just what is banned by the feather-bedding restriction has yet to be made. It can only be promulgated by the National Labor Relations Board as cases are decided. The definition will determine what degree of government regulation over industrial practice has been introduced by making it an unfair labor practice for a union "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."⁴³ In this case, limiting the uses to which a union's economic power may be directed brings government imposition of employment terms as a substitute means of settlement.

Summary

One important consequence of the Taft-Hartley Act is the extension of government's regulatory powers to cover the uses for which union power may be applied. Since the government assists the organization and protects the status of unions, it has been deemed appropriate for the government

⁴³For a more extended discussion of the implication of this aspect of the national labor policy, see pages 322 to 324.

to supervise union activities. The question of free unionism vs. government-regulated unionism has thus been precipitated.⁴⁴

A considerable degree of government regulation of unions has already been introduced. One can discern—in the anti-Communist affidavit provision and in the ban on political expenditures—an effort to restrict the use of union power to economic and industrial-relations objectives. Even as respects the resolution of certain industrial-relations issues, far-reaching restrictions have been placed upon union activities. As a means of effectuating provisions in this area, the right to strike has been curtailed. To settle issues over which the use of economic power is banned, compulsory arbitration has been incorporated as an integral part of the national labor policy.

The direction of the steps, along with the eagerness with which they have been accepted by the public generally, are far more important than the steps themselves. The steps are in the direction of a government-regulated labor movement, of restrictions on the right to strike, and of dependence upon compulsory arbitration. Patent abuses of its power by organized labor make the regulations in question appear to be reasonable and sound. Fundamental policy questions involved have been obscured in consequence. There should be no misconception, however, about the critical nature of a change in national labor policy that, for the first time, introduces government regulation of unions and compulsory arbitration into the industrial-relations scene. Further steps down the road of government regulation could lead us far away from the basic principles upon which our country has been built.

⁴⁴ The issue concerns principally the regulation of union power as described in this section, but also relates to such additional matters as the registration of unions with the Secretary of Labor, prescription of the form of financial statement to be furnished to members, and a supervision of the initiation fees charged by unions.

FACILITATING THE AGREEMENT-MAKING PROCESS

Certain negotiating procedures to be followed both by unions and by management are now specified in detail by law. In addition, the National Labor Relations Board has a duty and a responsibility to evolve such additional procedural regulations as may be necessary to insure "good faith" bargaining by both parties. Government regulation of the manner in which collective bargaining is conducted has become a reality.

The objective is laudable. Labor and management should make a bona fide and a sustained effort to resolve their differences around the conference table before resorting to work stoppages. In too many cases, this responsibility has not been fully met. Sometimes negotiations were bypassed. Economic force was used as the primary means for resolving differences rather than a weapon of last resort. As a result, Congress spelled out the negotiating responsibilities of both parties. Negotiations must now conform to a prescribed procedural pattern. These moves were taken with the hope of getting more agreements and fewer strikes.⁴⁵

Buttressing the agreement-making process was also behind Congress's grapple with the proposition that the government should do something to further "living up to labor contracts" by both parties. Provision was made for instituting "Suits for violation of contracts between an employer and a labor organization . . . in any district court of the

⁴⁵ In addition to prescribed procedures, other measures to facilitate agreement making are included in the Taft-Hartley Act. Peaceful settlement of labor disputes is to be assisted "by making available full and adequate government facilities for conciliation, mediation, and voluntary arbitration. . . ." These facilities will be discussed later in the chapter. Further, by Section 211 of the Act, the U. S. Bureau of Labor Statistics is directed to assemble data for the use and guidance of negotiators, including a file of labor agreements and "all available data and factual information which may aid in the settlement of any labor dispute."

United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”⁴⁶ Rules for negotiating agreements were thus supplemented by an approved government procedure for enforcing the contracts.

Strong arguments can be advanced in favor of government regulation of the procedures of collective bargaining. By assisting the parties peaceably to resolve their differences, fewer breakdowns of negotiations should occur. A strong system of collective bargaining could then be built up. Demands for government direction of the actual terms of employment would be turned aside. Such reasoning is based upon the premise that a line can be drawn between procedures that merely facilitate and those that influence the contesting positions of negotiators. The danger in such government regulation is that an acceptable boundary-line cannot be drawn.

If experiences under the Wagner Act and the wartime program afford any guides at all, it can reasonably be expected that the procedural requirements under discussion will be continuously and strenuously challenged. Contentions will be made that required procedures create an inequality of bargaining power and thereby indirectly determine or dictate terms of settlement.⁴⁷ Because of these factors, regulation of collective-bargaining procedures constitutes an extension of government control that can change the course of industrial relations. This aspect of the national policy calls for most searching appraisal. For through regulation of procedures, the government has intervened into the intimate processes of joint dealings between a union and a man-

⁴⁶ In Section 301 of the Taft-Hartley Act.

⁴⁷ Nor is this result less likely because of the “saving” provision, in Section 8 (d), which recites that neither party can be compelled to agree to any proposal or to make any concession. Relative economic power can be increased or diminished, depending upon the manner of its application. Procedural requirements control the application of power and thereby influence the relative strengths of the parties. They thereby also condition the terms of settlement.

agement. The rights and the positions of each of these parties in negotiation is affected, as will be apparent from the subsequent discussion.

General Regulations of Negotiating Procedures

Collective bargaining was not defined by the Wagner Act. Prior to passage of the Taft-Hartley Act, unions and management were "on their own" in devising negotiating procedures to meet individual necessities and desires. Joint dealings were conducted through whatever arrangements and channels the parties could agree upon. Either was free, moreover, to choose economic force as the primary means for settling issues. For good or for bad, these characteristics of collective bargaining have become matters of historical interest. Congress has now defined the essentials of good collective-bargaining procedures for all unions and for all managements. The definition is so far relatively simple. But ample provision is made for its expansion through rulings of the National Labor Relations Board.

The general duty to bargain collectively is presently stated as a mutual obligation of management and union representatives "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." ⁴⁸

A distinction between procedural requirements and the substantive terms for resolving an issue is evident in the definition. No concession and no agreement can be required if collective bargaining is to be preserved. Whether or not adequate steps have been taken to preserve the distinction in practical operation is quite a different matter. The government cannot avoid ruling upon and deciding a

⁴⁸ Section 8 (d) of the Taft-Hartley Act.

number of most critical industrial-relations issues in putting its definition of collective bargaining into practice.

Two parts of the general definition of collective bargaining recited above are so significant that they must be considered as being among the most important parts of the Taft-Hartley Act. Unions and management are required (a) to confer "with respect to wages, hours, and other terms of employment" and (b) to do so "in good faith." The exact subjects that are covered by "other terms of employment" have yet to be listed. In particular cases, the National Labor Relations Board will specify just what subjects are negotiable.⁴⁹ In the first year of operation under the Taft-Hartley Act, the N.L.R.B. held that employers are legally required to bargain over any subject that directly or indirectly affects wages and working conditions—specifically, over pension plans and over group health and accident insurance demands. In individual cases, the Board will also have to rule upon just how those subjects have to be negotiated in order to meet the legally required "good faith" standard. The definition of collective bargaining will take on substance only as cases are decided and as precedents are established. No one can anticipate what kind of procedural regulations will be promulgated. But it is not too hard to foresee some of the critical issues likely to come up.

Disputes over the scope of collective bargaining, i.e., the subjects to be negotiated, can bring about issues as difficult

⁴⁹ In a decision, issued on April 13, 1948, the National Labor Relations Board held, by a vote of 4 to 1 in the *Inland Steel Company* case, that employers must bargain over pension and retirement demands of a union. Since the Steelworkers Union did not meet the filing requirements of the Taft-Hartley Act within the period prescribed by the Board, the Union is not entitled to the benefits of the decision. However, the C.I.O. Executive Board has determined to contest the filing requirements of the Taft-Hartley Act particularly as respects filing of the non-Communist affidavit. The C.I.O. Executive Board has voted to contest the constitutionality of this non-Communist affidavit requirement by using the National Labor Relations Board order in *Inland Steel* as a test case. *Inland Steel Company* appealed the Board order to the Circuit Court of Appeals in Chicago, contesting the validity of the Board's holding.

as any in all industrial relations.⁵⁰ Is it a refusal to bargain collectively, as defined by the law, for an employer to insist that a certain subject should be excluded from joint negotiations? How will union demands for pensions, guaranteed wages, severance pay, and health funds be negotiated in good faith? And what about the introduction of company pricing policies into collective bargaining?

A ruling by a government agency requiring management to discuss a particular subject with the union can strongly influence the relative strengths of the parties that can be brought to bear upon the resolution of the issue itself. A ruling would appear, or could be made to appear, to employees and to the public as government support of the union demand. If a subject is negotiable, it is a matter of mutual concern. An agreement should be reached about it. On the other hand, a ruling that upholds a management claim that a particular subject is beyond the proper scope of collective bargaining will adversely affect the position of all unions pressing demands on that subject in all negotiations.

These fundamental questions about the inclusion of certain subjects within the joint relationship were formerly negotiated and fought out with widely varying results. Results now depend, certainly to a much greater extent, upon rulings of a government board. The scope of collective bargaining has been subjected to government regulation.⁵¹

Only from a theoretical standpoint can it be argued that determinations of scope issues will have no more than a procedural significance. Much more is involved in their regulation than has so far been suggested. What constitutes collective bargaining about a subject "in good faith"? If a

⁵⁰ The 1946 dispute between the General Motors Corporation and the UAW-CIO about "looking at the books," for example, was over the negotiability of company pricing policies and the relation of wages to prices. The protracted work-stoppage was occasioned by this issue more than any other one

⁵¹ For a discussion of the significance of the "scope" issue, see pages 14 to 16.

demand for pensions must be negotiated, for example, is management obligated by law to make available to the union a list of all employees by age groups? Should management be required to do so as a matter of compliance with the law, the claim of the unions for pensions will be further enhanced. Not much imagination is required to forecast the victory claims of a union over a decision requiring a management to produce records that had long been withheld from negotiations. Yet, how could a pension question be intelligently discussed "in good faith" except in relation to such data? Requiring unions and management to bargain in "good faith" gives broad and undetermined powers over the collective-bargaining relationship to the agency that administers the general definition of collective bargaining.

Refusal to abide by an adjective was made an unfair labor practice when "good faith" negotiation was included within the definition of collective bargaining. What is legally required of labor and management in this regard will depend ultimately upon rulings of the National Labor Relations Board and decisions of the courts. Whatever those requirements turn out to be, vital questions relating to the scope of collective bargaining and to the relative bargaining positions of labor and management will be influenced.

Can it be that such an extensive government supervision over collective bargaining was inadvertently incorporated in the national labor policy? A demand for such regulation stemmed initially from that one-sided section of the Wagner Act⁵² that made it an unfair labor practice for an employer to refuse to bargain "in good faith" but that imposed no comparable obligation upon unions. Here was one-sidedness at its worst. A story, doubtless a fantasy, was told of the labor union leader who broke up a negotiating conference by saying, "I refuse to bargain collectively with you. But no one of you employers could act as I am doing without violating the law."

If it was socially desirable to compel an employer to bar-

⁵² Reference is to Section 8 (5) of the Wagner Act.

gain, what logical reasons could be advanced against a similar compulsion upon labor organizations? Most discussions of the matter end with the observation that "what's sauce for the goose is sauce for the gander." Unfortunately, little or no attention has been paid to the disadvantages of requiring either unions or management to bargain "in good faith," as that particular requirement might later be defined by a government board and by the courts. Reformers overlooked the possibility that "equality before the law" could have been achieved by eliminating the unilateral requirement from the law. Extending that requirement to cover labor unions was not the only way to secure a more even-handed law.⁵³

To require both parties to bargain collectively and in good faith within the context of the Taft-Hartley Act can produce a far different result than would have obtained by a similar amendment of the Wagner Act. In some respects, the unilateral requirement upon the employer to bargain collectively was incongruous with the rest of the Wagner Act anyway. That legislation was focused upon organizing for collective bargaining. In conformance with the underlying philosophy of the Wagner Act, therefore, the provision for mandatory bargaining had significance mainly in relation to the encouragement of union organization. In initial collective bargaining conferences, immediately after a disposition of the representation issue, numerous organizational steps had to be completed. When employers were required to sign a contract, for example, organizational and union recognition questions were paramount and not the regulation of collective bargaining.⁵⁴

⁵³ The potential difficulty arises because of the inclusion of the requirement to bargain in good faith in the Unfair Labor Practices Section. It should have been set up as a part of Section 204, which states the duties of the parties in general terms without specifying any supporting sanctions.

⁵⁴ The point of view here expressed was not followed in its entirety in the administration of the Wagner Act. A clear distinction was not always made between encouraging union organization and helping the union gain specific demands. The author has always looked upon the Wagner Act as an instrument to enable employees to help themselves. The government agency

By and large, that section of the Wagner Act requiring employers to bargain was administered and applied with a view to developing those collective-bargaining procedures important in initial joint dealings to a completion of the organization process.⁵⁵ The section was not applied to dealings under established relationships. Any other administration would, it seems, have been contrary to the purposes of the Act. The usefulness of Section 8 (5) of the Wagner Act should have diminished as labor unions became widely organized and more firmly established.

Labor as well as management both had ample reason for seeking a deletion of Section 8 (5) of the Wagner Act to guard against extensive government regulation of collective-bargaining procedures. A repeal of that section would have given the "equality before the law" demanded by employers. Yet, the duty to bargain in good faith has been extended to cover labor unions. Of greatest importance is the fact that the words must now be interpreted and administered in the context of an Act not established solely to encourage employee organization, but to provide "orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other." The definition of collective bargaining to be made under that kind of a law constitutes a vast extension of government regulation.

Specific Regulation of Negotiating Procedures

In the foregoing section, only the generally stated procedural requirements of the Taft-Hartley Act have been

was responsible for furthering the organization of employees but not directly their aims. And the encouragement of free collective bargaining could not include government regulation of collective bargaining.

⁵⁵It appears that, with few exceptions, the employer's duty to bargain collectively was not invoked once joint dealing had got under way. As a matter of fact, the principal duty of the National Labor Relations Board under Section 8 (5) of the Wagner Act was to assist and to advise the parties in the inauguration of joint dealings where they had not previously been practiced. The tendency to require employers to make a counter-proposition caused much of the demand for a bi-lateral Section 8 (5) and the statement in the Taft-Hartley Act that no concessions need be made.

treated. The National Labor Relations Board and the courts will gradually give substance to these obligations as particular cases are decided. As they stand in the Act, the general procedural regulations impose uncertain obligations. They also involve great potential risks to the positions and as respects the objectives of both organized labor and management. At least there is not so much uncertainty about what is required to conform to those procedural steps specified for negotiating renewal agreements.

An existing collective-bargaining contract cannot legally be terminated or modified⁵⁶ unless the party desiring a change in terms of employment serves a written notice on the other party sixty days prior to the expiration date of the agreement⁵⁷ and offers to negotiate the issues raised. If no settlement is reached, the Federal Mediation and Conciliation Service must be notified within thirty days that a dispute exists.⁵⁸ Negotiators are obligated by law, therefore, to allow reasonable time both for negotiation and for mediation of demands for changes in existing contracts. A party upon whom demands are made is entitled, moreover, to a full knowledge of what they are and in ample time to permit their complete appraisal. Surprise demands, made as an agreement is about to expire, are excluded from the collective-bargaining relationship. And the use of a "sign now or have a strike tomorrow" technique is outlawed.

Specific procedural requirements of this type have a different effect upon industrial relations than the general requirements previously referred to. Specific "rules of the game" are largely facilitating in nature. They are less di-

⁵⁶ It can be presumed that an agreement may be modified by mutual agreement at any time and without regard to the procedural requirements under discussion. Such a conclusion may not be supported by giving a literal meaning to the words of the Act. It is, nevertheless, the only reasonable approach.

⁵⁷ Or, if the contract has no expiration date, "sixty days prior to the time it is proposed to make such termination or modification."

⁵⁸ These various requirements are to be found in Section 8 (d) of the Taft-Hartley Act.

rective of substantive issues because the judgment factor is not so important in their administration.

Even procedural regulations of the specific type, however, involve some uncertainties and risks to the parties. Old problems of collective bargaining are eliminated or minimized, but new ones immediately loom. For instance, will the government ultimately prescribe the kind of notice for contract modification that must be filed in order to conform to the law? If exact and complete demands have to be precisely spelled out and filed with the other party to a labor agreement sixty days prior to contract expiration, a considerable restriction upon the "give and take" characteristics of negotiations may be introduced. Nor will bargaining be facilitated if the size and the variety of demands thrown into collective bargaining by both parties are increased as a protective measure. After all, a demand not placed on the table within the deadline date can be introduced later only with extreme difficulty.⁵⁹ The procedures can easily tend to make big disputes out of little ones.

Whether or not an assurance of reasonable time for negotiation and for mediation, with the absence of any threat of an imminent work stoppage, outweighs the risk that demands will be increased, can only be determined from experience. At present, and without much experience on the subject, the new impediment to agreement-making appears to be more formidable than the ones that were eliminated. If "something had to be done" to improve the processes of collective bargaining, however, the regulations under discussion have more potentiality for bringing about constructive results than any other part of the Taft-Hartley Act. A requirement of specific negotiating procedures involves, moreover, far less invasion of collective-bargaining rights than the

⁵⁹ Once initial demands have been filed in accordance with the Act, an introduction of new demands later on would seem to extend the terms of the old agreement. Even so, whether or not new demands could be made would probably require the consent of the other party to the negotiations.

other extensions of government regulation that have been made.⁶⁰

Some doubts exist about the applicability to the mediation requirement of the comment just made. There is a practical difference between compulsory negotiation between the parties and compulsory mediation that brings the government to the bargaining table. Such a distinction can still be made, even if one concludes that use of mediation is one of those reasonable steps that should be taken before a work stoppage occurs.

An opportunity must be afforded to the Federal Mediation and Conciliation Service to exercise its good offices before a strike or a lockout is started, if commission of an unfair labor practice is to be avoided. That opportunity may be made available during the last thirty days of the term of an expiring contract. Delay in filing the required notice with the Mediation Service could conceivably bring about an automatic extension of the old contract terms. The rights to strike or to lockout would then be deferred, if necessary, to allow for adequate mediation. Mediation under government auspices has thus been made an integral part of the bargaining procedures required by the national labor policy.⁶¹

⁶⁰ In this connection, however, some mention should be made of the restriction on the right to strike that is introduced to assure time for negotiation. That restriction does not apply unless a union fails to submit its demands sixty days prior to the expiration of an agreement or fails to notify the Mediation Service of the existence of a dispute, as required. Elimination of surprise demands and of shifting demands for contract changes, geared to the threat of an imminent stoppage of production, is eliminated from collective bargaining. Any restriction on the right to strike is in the nature of a penalty imposed on a union for failing to conform to these negotiating regulations. Still another right is affected—the right of contract. No day-to-day labor agreement can be made. A sixty-day notice of change is a prerequisite to cancellation of any agreement, even one that lacks a termination date.

⁶¹ Section 201 (b) of the Taft-Hartley Act states, in part, “the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and

There is no way of forecasting whether mediation techniques, as contrasted to pure conciliation activities,⁶² will be extensively developed to facilitate agreement-making. The extent to which the government mediation agency appraises contesting positions in a dispute and offers suggested "fair and equitable" solutions will determine whether or not the government assumes a position of authority at the bargaining table. Adoption of an out-and-out mediation approach would represent a major change in national labor policy.

In one kind of situation, the mediation approach, as here conceived, is required by the Taft-Hartley Act. After conciliation has been tried without success, the Director of the Mediation Service must try "to induce the parties voluntarily to seek other means of settling the dispute . . . including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot."⁶³ Here is no mere "keeping the parties talking" which typifies simple conciliation. The government throws its weight to give a new kind of status to the employer's last offer.

A refusal of either party to agree to any suggested settlement procedure, including the vote on the employer's offer, "shall not be deemed a violation of any duty or obligation imposed by the Act." Suggestions for some particular means of settlement by the Mediation agency could, nevertheless, have an important bearing upon the relative

maintain agreements concerning rates of pay, hours and working conditions . . ." In Section 204 (a), Paragraph 3, a duty of the parties is described as being to "participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute."

⁶² For a discussion of the differences between conciliation and mediation, see pages 99 to 105.

⁶³ Note should be taken of the comment about this provision made on page 62 of the Conference Report, Report No. 510 of the 80th Congress, 1st Session, prepared by the "Managers on the Part of the House." They state: "While the vote on the employer's last offer by secret ballot is not compulsory as it was in the House bill, it is expected that this procedure will be extensively used and that it will have the effect of preventing many strikes which might otherwise take place."

strength of the parties in many a case. Readiness or reluctance of one party to "put it up to the employees" would be indicative of confidence or lack of confidence in a position. Proposals for setting up a fact-finding board, as another example, might be favorably looked upon only by one party. By failing to "go along," the other party might run the risk of being "uncooperative" and of losing the support of public opinion. The emphasis placed upon "mediation" by the establishment of the Federal Mediation and Conciliation Service was not inadvertent or illogical.

The mediation problems just mentioned and many others of a similar nature are subjects that should properly be considered by the National Labor-Management Panel provided for in the Taft-Hartley Act.⁶⁴ Composed of an equal number of labor and management representatives, this panel has the duty, "at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare." In the work of this panel, a rare opportunity is afforded to labor and to management constructively to work out, by discussion and by agreement, the place of mediation in a sound national labor policy.

Many improvements can be made in the techniques of collective bargaining. The manner in which mediation, fact-finding, and voluntary arbitration can most satisfactorily facilitate agreement-making is a subject largely unexplored. If labor and management accept a responsibility for voluntarily developing the agreement-making potentialities of collective bargaining, they can best insure retention of their latitude and judgment. Procedures to facilitate collective bargaining are virtually certain to be more workable and more effective when they are developed by labor and management representatives than when they are imposed by a government agency.

⁶⁴ In Section 205 of the Act.

A great deal of lip service has been given over the years to the desirability of looking upon strikes and lockouts as weapons of last resort to be used only after every reasonable means of securing a settlement by peaceful means has been tried without success. Regulation of negotiating procedures by the government may be looked upon as an attempt to say just what are those reasonable means that should be used to resolve a dispute before work stoppages are undertaken. Promulgation of procedural regulations by the government entails risks that have just been described. On the other hand, great forward progress can be achieved by the development of more effective bargaining procedures developed in terms of a workable boundary line between procedures that facilitate agreement and those that influence or direct the terms of settlement. A great challenge and a rare opportunity for constructive work goes to those charged with responsibility for administering the specific procedural requirements of the Taft-Hartley Act.

Inducing Agreements in National Emergencies

Labor disputes with national emergency implications⁶⁵ are subject to more detailed and more drastic procedural regulations than ordinary labor disputes. The purpose is to force a settlement if possible. These procedures cannot possibly be regarded as merely facilitating. To be sure, the government at no point passes any outright judgment upon the

⁶⁵ By definition, in Section 206 of the Taft-Hartley Act, national emergency disputes are those that affect "an entire industry or a substantial part thereof . . ." Disputes in key plants or in public utilities are not covered unless they can somehow be brought under the definition. One procedure to be used for resolving an unsettled industry-wide dispute includes "a secret ballot of *the employees of each employer involved in the dispute* on the question of whether they wish to accept the final offer of settlement of their employer, as stated by him." (Italics supplied.) The definition of national emergencies and the required plant-by-plant voting on the employer's offer give substance to a query about whether or not the provisions promulgated ostensibly to deal with national emergencies are more in the nature of a policy for dealing with certain problems of industry-wide bargaining. In other words, should the national emergency section of the Act be viewed as its anti-industry-wide bargaining provision?

merits of the issues in dispute. Nor does it directly approve particular terms of settlement.⁶⁶ But the required procedures exert heavy pressures upon each disputant to modify his position sufficiently to make agreement possible. Even a brief review of the applicable procedures reveals the strength of those pressures.

If a threatened or an actual stoppage of production affects an entire industry⁶⁷ and also imperils the national health or safety, a Board of Inquiry may be appointed by the President to investigate and then to make a factual report about the dispute. No recommendation may be made by such a Board; recommendations would not only directly influence the relative positions of the disputants but might put the government "in the middle." It is only logical to presume, however, that, in gathering the facts, the Board of Inquiry will take whatever steps it can to assist the parties to resolve their difficulties by agreement.

An additional reason for making some modification of previously assumed positions is introduced by the government. An agreement would make defense of one's position in the fact-finding hearings unnecessary. The risks involved in that kind of procedure would, moreover, be avoided.⁶⁸ In most emergency cases, avoidance of the fact-finding procedure would presumably not give advantages enough to induce a settlement. Additional procedures to induce the parties to come to an agreement would then come into play.

⁶⁶ The importance of its not "taking sides" is thereby recognized by the government. Proposed solutions by the government could change the nature of a dispute from one between employees and employers to a dispute between one of these parties and the government.

⁶⁷ Or a substantial part of an industry.

⁶⁸ In any public hearings, the arguments of the parties would be put on view before the public. By the manner of presentation, as well as the merits of the contentions, public support might be influenced in favor of one side or the other. In many cases, a public hearing would doubtless be advantageous to one side and disadvantageous to the other because of the public-opinion factor. So, risks to the parties may be entailed by the setting up of a Board of Inquiry.

The President is empowered to direct the Attorney General to petition a district court for an injunction against a strike or a lockout having national emergency characteristics. The court may issue an injunction upon finding that an industry-wide work stoppage would imperil national health or safety. With the issuance of an injunction, the parties are expected to resume negotiations with the assistance of the Federal Mediation Service. At the same time, more fact-finding is undertaken. The original Board of Inquiry in the case is reconvened and, after sixty days, must report publicly⁶⁹ on the facts of the dispute.

Most disputants would avoid these "next steps" if at all possible. They introduce into collective bargaining new reasons for compromise and settlement. Concessions previously withheld may become a "good business" proposition when they are weighed against the disadvantages of an injunction and of being held accountable before the bar of public opinion. A union may look more favorably upon the employer's terms because only an acceptance of them will insure against the issuance of an injunction. An employer may increase his last offer, not solely to make it more acceptable to the union, but because it may be publicly announced. And both parties, by this time, will be called upon to render an accounting to the public about their positions and their efforts to come to an agreement. The penalties for unsuccessful bargaining mount as the successive required procedural steps are taken.

Application of pressure for a settlement continues if, during the term of the injunction, no agreement is reached. The National Labor Relations Board is then required to "take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish

⁶⁹ The report is made by the Board to the President and must cover "the current position of the parties, and the efforts which have been made for settlement and shall include a statement by each party of its position and a statement of the employer's last offer of settlement." The President makes such report available to the public.

to accept the final offer of settlement as stated by him.”⁷⁰ That kind of balloting carries a considerable risk to both parties. It might be worth some very real concessions on both sides to make the ballot unnecessary.

Acceptance by the employees of the employer's best offer, after its rejection by union officers, might well raise the question of whether or not the union any longer represents the employees. Many a union will take “another look” at the employer's offer before submitting it to a trial by ballot. At the same time, most employers will feel under some compulsion to make a better offer, so that his employees will take it if the union rejects it—for a resounding “no” vote by the employees would not only be “bad public relations” for a company but a demand of the employees for something much better.

Application of all these procedures may not suffice to induce a settlement. The injunction must then be dissolved and a record of the entire case is submitted by the President to Congress with “such recommendations as he may see fit to recommend for consideration and appropriate action.” The last step, submission of the case to Congress, is a final pressure upon the disputants to come to terms. Both parties would ordinarily be expected to see advantages in keeping their particular problems “out of Washington.” Only if they are willing to run the risks of Congressional action on their dispute can the parties finally regain their rights to strike or to lockout. These rights are not outlawed. But their use is delayed. Qualification to exercise these rights includes the acceptance of rather severe penalties in the form of procedures required as a prerequisite to a work stoppage.

The theory that is implicit in the imposition of procedural pressures to deal with national emergencies (industry-wide disputes) has unusual interest. Earlier reference was made to the agreement-making function performed by the rights

⁷⁰ Required by Section 209 (b) of the Taft-Hartley Act.

of strike and of lockout.⁷¹ Compromise and agreement are induced because only the voluntary settlement of issues will avoid a plant shut-down. Entirely different inducements to agree are provided in the procedures set up by the Taft-Hartley Act for utilization in emergency disputes. In other words, certain procedures are assigned the functions ordinarily attributed to the strike and to the lockout.

Compromise and settlement are the sure ways of by-passing the arguing of positions before a fact-finding board, the issuance of an injunction, a public announcement of positions assumed and efforts to settle, submission of the employer's offer to secret ballot of the employees, and referral of the case to Congress. By looking upon these procedures as an attempt to develop substitutes for work stoppages, necessary in cases where production stoppages would imperil the public well-being, they can best be understood and intelligently appraised.

The provisions under discussion are meritorious in that they involve no direct imposition by the government of the conditions of employment. Terms under which men work and under which management runs the plants are not ordered by the government. Unanswerable questions about what sanctions can be utilized to secure acceptance of terms imposed by the government are not raised.

Whether the procedures that become operative in national emergencies put an excessive pressure upon one side to accept the terms of the other is an argument that cannot be side-stepped. Will unions be forced to accept employer terms, or will a net bargaining advantage accrue to the labor organizations? The question of whether "equality of bargaining power" has been preserved will never be answered to anyone's satisfaction. It will become the center of considerable controversy and will evoke insistent and continuing demands for changes in the rules of the game.

In the meantime, the effort to develop functional sub-

⁷¹ In Chapter 1.

stitutes for the rights of strike and of lockout must be appraised as a new and imaginative venture undertaken to deal with one of the most difficult problems of industrial relations. Such a course is the only way open to deal with situations in which the use of strikes and lockouts to perform their collective-bargaining function is not compatible with national safety.

Summary

Government regulation of bargaining procedures, undertaken for the purpose of assisting negotiators to come to a meeting of minds, was inaugurated in a sweeping fashion by the Taft-Hartley Act. For the most part, an attempt has been made to require procedures that assist agreement-making and not to require procedures that influence or direct any particular terms of settlement. At best, that line is extremely difficult to draw. Mandatory procedures will almost inevitably be of value to one side and a detriment to the other. Whether or not the required procedures are fair and equitable is certain to be a central issue of industrial relations for many years to come. And a determination of that issue will have to be made in the political arena.

Keeping the Agreement

Plans inaugurated by the Taft-Hartley Act to facilitate collective bargaining were not limited to the procedural regulations already described. Rules for "living up to" an agreement of the parties, after it has been made, are also legally prescribed. That completes the procedural cycle. Virtually every step of the bargaining relationship is subject to regulation.

Rules govern organization and operation of unions, steps to be followed in contract-making, and they also extend into day-by-day operations. Added for good measure is the suggestion that suits for damages in the federal courts is an appropriate way to secure redress for violation of the labor

agreement. It is the last two areas of regulation that are now to be evaluated.

Those who have not worked intimately in the industrial-relations field cannot be fully aware of the magnitude and delicacy of the problems met with in applying a labor agreement to plant operations. To begin with, these agreements are not like contracts for the sale of goods; they specify ground rules for a continuing human relationship. Administration of the labor contract is concerned with settlement of all sorts of issues, real and imaginary, that arise in the day-by-day operation of a plant or establishment as human beings strive to compose their differences. Agreement terms provide guides—sometimes only very hazy ones—for the disposition of these issues. Seldom do they supply clear and unmistakable answers to the underlying problems that are raised. Never will they, of themselves, guarantee cooperation and understanding.

The labor agreement has not been drawn that will neatly and exactly provide for every contingency that arises during the year or more of its term. Nor should it attempt to do so. Human relationships are not soundly developed by rigid reliance upon abstract formulae. Allowance must be made for the exercise of considerable judgment when a general clause of an agreement is applied to the peculiar facts of a particular case. Employees have a valid claim for the appraisal of the merits of their grievances.

For these reasons, it is very frequently said that day-by-day relations in the plant are "the very heart of collective bargaining." It is here that industrial relations is an art rather than a science. And into these intimate aspects of collective bargaining, government regulation has been extended. Deciding whether or not the terms of an agreement were violated is not such a direct and clear-cut proposition as the framers of the Taft-Hartley Act apparently assumed.

Through the definition of collective bargaining, as set forth in the Taft-Hartley Act,⁷² both parties to a contract are

⁷² In Section 8 (d).

legally obligated to meet at reasonable times and to confer in good faith with respect to any questions arising under an existing agreement. That probably seems reasonable, and even innocuous, to the uninitiated. In reality, that requirement affects such vital aspects of administering an agreement that it could seriously retard the search for good relations. Exactly what questions *arising under a contract* must be negotiated? And what constitutes good-faith bargaining of them? The implications of these questions are every bit as far-reaching as in the case of bargaining for a new labor contract.⁷³

Only through Board and court decisions will it be known just how far government regulation over day-by-day operations has been extended.⁷⁴ There can be no doubt, however, of the involvement of the so-called management security issue.⁷⁵ Any decision made by the National Labor Relations Board about the kind of questions "arising under an existing agreement" that have to be negotiated in order to conform to the law will have a bearing upon management security. A subject that becomes a matter for joint determination is removed from the list of those matters that are under the sole control of management.

Management security issues come up in day-by-day bargaining because a labor agreement typically does not cover every condition of employment that prevails in a plant. Parties to a labor agreement quite frequently assume that any conditions of employment not specifically covered by the written understanding will continue "as they were." If

⁷³ See pages 279 to 282 for a discussion of this subject.

⁷⁴ Only one *specific* regulation covering day-by-day collective bargaining is promulgated by the law. Under Section 8 (d), neither party has any obligation "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the terms of the agreement."

⁷⁵ The issue is also called "management's demand for the right to manage." Management contends that proper performance of its functions requires it to have the "sole prerogative" to make decisions over certain subjects, such as production methods, order of work, and location of plants. In other words, such subjects are not matters for joint determination.

no reference is made in the agreement, for example, to rules pertaining to smoking on the job, it is frequently assumed that all past smoking practices will continue without change.

Such an approach is reasonable and logical. Unions have a right to make a request for a change in any practices or conditions of employment during contract negotiations. If no issue is raised by the union at negotiation time, no problem of mutual concern then exists. Should a question arise over nonagreed-upon practices during the term of an agreement, and if it is not settled by mutual agreement, the problem can be dealt with in the next general negotiation. A disadvantage to this kind of relationship is that some problems may continue too long as unresolved "sore spots." That is, unless the parties see the need for coming to a mutual agreement about them. On the other hand, continuous negotiation over the basic terms of employment doesn't contribute to a stable relationship and can seriously interfere with the main job of labor and management—producing goods.

The relationship just described ⁷⁶ is not universally approved by any means. Some representatives of management object strenuously to it. So do some union representatives. Each group has telling arguments in support of its contentions. An explosive issue can easily develop where the labor contract does not explicitly provide either for a continuance of those past practices and working conditions not changed by the agreement or for some other status for these phases of the relationship.

Management often contends that a failure to incorporate smoking rules in the agreement, for example, doesn't signify at all that past practices are to be continued. Quite a contrary contention can be made. Management can insist that it has implicitly reserved the right to issue new smoking rules

⁷⁶ Most unions and management following that approach don't attempt to rationalize their policy. They use the approach as "a matter of plain common sense."

as it sees fit.⁷⁷ Management thus seeks to reserve its "prerogative," or the right of exclusive direction, over every subject not dealt with in the labor contract.

Sometimes as a counter-measure, but often as an offensive tactic, some union representatives contend that every subject of mutual concern is properly encompassed by the collective-bargaining relationship. Unless a condition of employment is particularly covered by a labor agreement, they maintain, no agreement concerning it has been reached. They then insist upon the right to bargain over any unmentioned subject during the life of an agreement whenever a problem over that subject arises.⁷⁸ To use the same example, the union representatives would claim a right to bargain collectively over the smoking rules during the term of an agreement. What is a proper matter for bargaining under a contract and for submission to an arbitrator if one is provided for, can become most complex.

All sorts of understandings, explicit or tacit, have been worked out by unions and management to give an agreed-upon status to conditions of employment not covered by a labor agreement. No uniform regulation of these aspects of day-by-day collective bargaining can adequately deal with such questions of fundamental policy. Not mere contract interpretation but widely differing concepts about the nature of the labor agreement have to be reconciled. Whether collective bargaining is a means for "containing" the union or a growing system for cooperative dealing is often the issue.

The definition of day-by-day collective bargaining, as set forth in the Taft-Hartley Act, will inevitably call for National Labor Board determinations about the kind of nego-

⁷⁷In some industry circles, this is called the "common law" approach. Management claims that ownership rights under the common law include every prerogative to run a plant as the owner sees fit. Such rights are given up, they reason, only to the extent of their explicit relinquishment.

⁷⁸Bargaining over an unmentioned subject is required, unions often maintain, as a phase of effectuating an unqualified no-strike clause. If the right to strike over a certain problem is precluded, then an alternate means of dealing with that problem has to be available.

tiations legally required for working under a labor agreement. Discussions about an outright modification of an agreement cannot be required. But are the parties legally bound to negotiate in good faith over conditions of employment not covered by the labor agreement? Especially, are they required to do so when an unqualified no-strike clause is in the agreement?

Any decision by the National Labor Relations Board, one way or the other, to resolve a single dispute over this question can vitally affect the nature of day-by-day collective-bargaining relationships throughout the country. As precedents are established, a standardizing process will begin. Up to now, applying the labor agreement through day-by-day bargaining has been accomplished by a variety of methods. One may question whether that variety is compatible with the requirement of the Taft-Hartley Act that the parties must legally negotiate over every question arising under a contract. At any event, as the legal rights and obligations of the parties in "living up" to their contract are amplified, fundamental bases of the relationship between the parties will be fashioned for better or for worse.⁷⁹

Something of an incongruity exists in the Taft-Hartley Act between its definition of collective bargaining, with implications just referred to, and its policy declaration that day-by-day relations should not be supervised by the government. The desirability of working out daily problems "by such methods as may be provided for in any applicable agreements for the settlement of disputes" is pointed out.⁸⁰ In addition, final adjustment by a method agreed upon by

⁷⁹ Although the foregoing discussion deals mainly with the scope of day-by-day bargaining, it is likely that a similar kind of dilemma will also arise over the definition of "employee grievances." Sometimes they are narrowly conceived as allegations that rights guaranteed by a contract have been denied. But, in other cases, they also cover any claim of unfair treatment. Unless the labor agreement is clear on this point, cases relating to definition of a grievance may have to be submitted to the Board for decision.

⁸⁰ Reference is to the policy statement in Section 201 (b) of the Act.

the parties is "declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."⁸¹

Whenever the parties fail to agree upon all of the details of their day-by-day relationship, disputes determinable by the government may come into being. If organized labor and management would securely keep in their own hands an adequate control over their day-by-day collective bargaining, they had better set down very clearly in their own agreement just what subjects can be collectively bargained under it. The nature of a grievance, both for purposes of negotiation and for arbitration under the agreement, should also be explicitly stated. Any failure to incorporate an understanding on such matters in the labor contract may bring them within the jurisdiction of the National Labor Relations Board. Introducing such questions into labor negotiations, however, may easily create controversies over issues long quiescent. Adjustments to the government regulation of day-by-day bargaining have already created problems of some magnitude.

It is unfortunate, indeed, that government regulation has been extended to cover day-by-day collective bargaining. Truly significant strides were made by organized labor and management in recent years in the handling of grievance disputes. Use of arbitration as a final step in the grievance procedure has become an increasingly standard practice. The parties have come to understand that the day-by-day aspects of their relationship are, in many ways, even more vital than the negotiation of agreement terms. If this sound and steady development becomes bogged down as a result of the interjection of government rules, collective bargaining will be hindered and not facilitated.

A backward step was also taken when the courts were given responsibilities for determining whether or not a labor

⁸¹ From Section 203 (d) of the Taft-Hartley Act.

contract has been violated. Application of a labor agreement to operating problems is quasi-judicial in nature, but also involves a judgment about what is sound according to good industrial-relations standards. Most labor agreement terms are not self-effectuating. The clear and unmistakable answer to many problems is frequently not to be found in the agreement at all. Some agreement terms even have relatively little real meaning until employee grievances concerning them have been settled. These facts of industrial-relations life can never be ignored when questions of alleged contract violations are under discussion.

In most labor agreements, to use a simple example, management reserves the right to discipline "for cause." The exact rights that are reserved will only gradually become known as discipline is assessed upon employees and as the penalties are accepted, modified, or reversed under the grievance procedure. Particularly in the early stages of a relationship, settling a grievance of this kind is much more akin to continuance of the bargaining process than to application of an understanding already reached.⁸²

From one company to another an identical clause in the labor agreements is virtually certain to be worked out in quite different ways. For instance, discipline may be imposed in a rigorous or in a lax manner, depending upon the disposition of grievances. Certain types of employee misconduct may be entirely overlooked in one plant and call for harsh penalties in another.

Grievance settlement thus often establishes the precise conditions of employment far more importantly than is done in the original contract negotiation. In some cases, the terms of an agreement have even been completely nullified

⁸² This largely explains why so many troubles arise under initial agreements. Reservation to management of the right to discipline for cause is no more than an agreement that management may impose discipline but that the employee may appeal. Only a procedure is agreed upon. What does "for cause" mean? About this aspect of the matter, there is seldom a meeting of minds when a first agreement is signed. Disciplinary grievances may be looked upon as the vehicles for continuing collective bargaining about the meaning of "for cause."

by labor-management agreements in the settlement of grievances.⁸³ Whether or not a certain discipline imposed by management, or a particular promotion, constitutes a violation of the agreement is not so much a question of law or of contract interpretation as it is a matter of judgment about what is necessary to maintain efficient operation and a sound labor relationship under circumstances prevailing in a plant.

Most employee grievances are claims that management has violated the labor agreement. They are in the nature of allegations that a disciplinary layoff was not "for cause." Or that rights guaranteed under the agreement were denied an employee when he was not promoted to a job vacancy. Out of the settlements of these and many other issues, the precise terms of the industrial relationship gradually take on shape. Since the labor contract doesn't provide, and cannot provide, a complete meeting of minds on the details of all subjects covered, the complete understanding has to be hammered out in day-by-day collective bargaining. Collective bargaining really begins with the signing of a contract; it is not completed when the signatures go down on the dotted line. Whether or not a contract has been violated is no simple matter of contract interpretation.

Employees initiate most of the issues arising in day-by-day collective bargaining. They allege that management has violated the agreement.⁸⁴ Only against this background

⁸³ In one plant recently, top management suddenly became aware of the fact that the plant people were making all promotions on a straight seniority basis even though the agreement called for primary emphasis on ability in deciding who should be promoted. The "established practice" evolved in handling promotion grievances had become so widely accepted that the "rights guaranteed by the contract" were quite meaningless.

⁸⁴ Employees will always precipitate most of the issues as long as management retains the right—and it should have the right—to make decisions necessary to keep the wheels of industry turning. That is an essential management function. Management makes the decisions as to what the agreement means, and employees carry out those decisions. But employees then can protest that the decision made by management violates their rights under the agreement, and they can seek to be "made whole" for any losses incident to following the management order. The parties sometimes forget that management may also institute a grievance if it believes the union or the employees have violated the agreement. Failure to appreciate the full functions of a grievance procedure has resulted in a wholly un-

can a proper perspective be drawn on that section of the Taft-Hartley Act that indicates the propriety of bringing suits in the federal courts for alleged violations of labor contracts.⁸⁵ Although that provision of the Act was designed to improve relations under agreements, it actually introduced unusual impediments.

Some unions have refused to continue the no-strike clause in their labor agreements. Others have insisted upon enervating qualifications. Wildcat strikes cannot be construed as agreement violations in those cases. Management has not been so insistent upon getting agreement terms that will protect it from possible suits for damages over grievance violations. Where this risk has been perceived, incorporation of an inclusive grievance procedure and of a terminal point of the grievance procedure as the exclusive means for disposing of the day-by-day issues, has been looked upon favorably by management.

There cannot be much doubt that the provision for court suits "by and against labor organizations" was incorporated in the Taft-Hartley Act primarily to deter wildcat strikes and other interferences with production. Despite contractual commitments made by the union, sometimes on behalf of its members individually, stoppages of work and other interferences with production frequently occurred. They violated the agreement. Some of them arose out of tensions incident to the hammering out of precise understandings not provided in the basic agreement.⁸⁶ But a sizeable proportion of the wildcat strikes were an irrespon-

realistic appraisal of the problem of getting "compliance" with the terms of a labor agreement. As will be noted on following pages, the idea exists that employee grievances should be handled under the contract but that employer grievances should be decided by the courts

⁸⁵ Reference is to Section 301 of the Act, entitled "Suits By and Against Labor Organizations."

⁸⁶ Workers sometimes felt that, in bargaining over grievances, management was engaged in a campaign to recapture ground lost in the bargaining for the new agreement. And management sometimes believed that union attitudes on grievances primarily constituted a continuance of the drive to gain objectives that were not achieved in the basic agreement.

sible use of economic force in lieu of orderly procedures as set forth in the labor agreement.

Management took the view that, since it could be readily penalized for contract violations,⁸⁷ the union should also be held responsible for living up to the terms of the agreement. Not much difference of opinion can exist about the "sanctity of the labor agreement" as respects both contracting parties. Management's demand for legislation to facilitate suits against unions for alleged contract violation, however, represents a serious failure to analyze the problem at hand.

Settlement in the courts of employee allegations that management has violated an agreement would unquestionably not contribute to industrial stability. Anyone can see that. Thousands upon thousands of grievances are submitted every day. In most of them, an employee contends that his rights under the agreement have been infringed upon by management. By the manner of disposing of that contention, the terms of the industrial relationship are gradually evolved. These issues should not be thrown into the courts. They should be settled through machinery set up and operated by the parties themselves.

The same machinery should dispose of any management allegation that the employees or the union have violated the agreement. For giving substance to the no-strike clause is just as much an evolutionary process, centering around day-by-day relationships, as in the case of any other contract terms. Management's obligations under some clauses and the employees' responsibilities under others are gradually hammered out through bargaining under the agreement.

Experience has convincingly shown the desirability, and the necessity, of dealing with management grievances in the same manner as employee grievances. The argument that a union cannot be made responsible except by giving

⁸⁷ Employees whose rights were infringed upon by a management decision could be "made whole" through payment of back wages or by a reversal of a disputed decision.

management an easy access to the courts is not valid. "Damages" may be assessed and penalties may be imposed through the grievance procedure for violations of the no-strike clause just as in the case of employee grievances against management.⁸⁸

The best way of working toward full responsibility of both parties under an agreement is through the machinery of the agreement itself. This observation applies as cogently to employee interferences with production as to grievances against management. Employees responsible for violating a labor agreement subject themselves to discipline. Few, if any, really "spontaneous" strikes occur. They are engineered. The instigators of them are the ones to hold responsible. Recognition of this simple fact and the use of a considered discipline policy, will do more to effectuate the no-strike clause than any right to sue a union that may be provided by law.

The problem of "union responsibility" under a contract would be much better understood if both the management and the union looked on it first of all as an "employee discipline" problem. Making unions suable in the courts can logically be related to failures to create an adequate disciplinary program under collective-bargaining relationships. Either management or the union may be primarily responsible. But, in either case, the right to sue will never be an adequate substitute for a proper disciplinary policy to deal with employee violations of the agreement.

Another facet of the matter needs more careful treatment

⁸⁸ A notable comment on the Taft-Hartley Act program for bringing about union compliance with contract terms is that most employers actually have no intention at all of ever entering a suit for damages against the union with which they deal. Actual collection of damages would, they well know, not further the cause of sound relations. But a curious reasoning is employed. The right to sue unions is extensively viewed by employers as useful because, like a sword of Damocles, it will keep unions on guard and impel them to "live up to their agreements." Some of the employers have not yet become aware of the sword over their own heads despite the fact that, in the grievances filed, they are charged with contract violations every day. In any event, fear and threats are not conducive to understanding and cooperation.

than has yet been given to it. Earlier reference was made to the right of management to introduce "grievances" against a group of employees or against the union, alleging a contract violation. Interferences with production by some employees are matters of mutual concern for the union and the management. Bargaining out the best ways of avoiding them is in the interest of employees as well as of management. Such a course needs emphasis rather than the assessment of damages. Losses suffered because of wildcat strikes or other interferences with production entail heavy costs to everyone involved. Neither the management nor the workers like or want them. Mutual advantages are gained by handling work stoppage questions through the orderly processes of the grievance procedure.

Under many well-established relationships, such a procedure has often resulted in assessment of "damages" on the employees,⁸⁹ and, more importantly, in arrangements that make a recurrence of wildcat strikes unlikely. When interferences with production by the union members are handled as employer grievances, the emphasis is customarily placed upon prevention. That is the sound approach. Imposition of penalties is primarily a means to an end. In these ways, the responsibility of employees to carry out the no-strike commitment can be firmly integrated as an established way of industrial life. That is convincingly shown by long experience in the hosiery industry and in the needle trades, among numerous other situations.

A breakdown of plant discipline, during the war years and in the postwar period, along with a failure to recognize the varied functions of the grievance procedure, largely accounts for the formulation of a government policy to cover enforcement of labor agreements. Suits by and against labor organizations over alleged violations of contracts are a wholly inadequate substitute for the creation of a proper discipline

⁸⁹ Such "damages" were recently awarded in a case coming before an Impartial Chairman when employees were required to work at straight time on a holiday to "make up" production lost by an unauthorized stoppage.

program and for the development of a grievance procedure to settle all allegations of contract violations. Only if the suability provision of the Taft-Hartley Act focuses attention upon these aspects of the joint relationship will it serve any constructive purpose.

It takes little imagination to anticipate that actual filing of an employer's claim for damages, on the ground of a contract violation by the union, will be followed by a countersuit. The union will claim that management violated the contract first and in such a way as to provoke the employees beyond all reason. Which party violated the contract first and most obnoxiously will be the issue for decision by the court. One cannot overlook the possibility that some judicial rulings might even justify a wildcat strike under certain provocative conditions, despite the existence of a no-strike clause in the agreement.

No matter how well-meaning were the underlying intentions, policies introduced by the Taft-Hartley Act to insure full performance of the terms of the labor agreement have particularly doubtful value. They are not adapted to the realities of the compliance problem. They are, therefore, virtually certain to impede the cause of good industrial relations if they are put into effect. Only the parties to an agreement are in a position to build their relationship soundly through day-by-day bargaining over grievances. Only a well-conceived policy for plant discipline, along with the use of the grievance procedure by employers, can meet the problems of "union responsibility." Failures of collective bargaining in these various particulars have been erroneously diagnosed as failures to live up to an agreement. Agreement-making and not agreement-interpretation is actually involved.

DETERMINATION OF SUBSTANTIVE ISSUES

Government regulation of procedural rules for joint dealing and covering contract administration has been greatly ex-

tended by the Taft-Hartley Act. An additional jurisdiction has been exercised by the government as respects certain substantive terms of employment. Actual terms of employment, in a number of instances,⁹⁰ are either specified directly by the law or are made subject to determination by the National Labor Relations Board. Organized labor and management are deprived of latitude of decision in their attempts to solve problems in such regulated areas. Congress has concluded that certain terms of employment, formerly matters of collective bargaining, can be disposed of better by legislation than directly by the parties.

Any management satisfaction that might derive from immediate setbacks to organized labor's program should be tempered by a realization that actual terms of employment are now a proper subject for government determination. Legislated conditions of employment need not remain, and undoubtedly will not long continue, as they now exist on the statute books. Nor need they be limited to the subjects now encompassed. Establishment of the principle that the government may determine actual conditions of employment is a far-reaching modification of free collective bargaining.

Political power rather than economic power becomes the final arbitrament when terms of employment are fixed by legislation. As it evolves, the new labor policy may consequently even prove to be more restrictive of industry's than of organized labor's rights. It is difficult, in any event, to see how industry can retain a preponderance of political power over the long pull.

In this connection, one can say, with considerable logic, that organized labor was certain to plan anyway for the reference of more and more industrial-relations issues to the political field. There need be no conjecture at all, however, about the direction of the steps actually taken when Congress determined that collective bargaining could no longer be

⁹⁰ The instances relate to union security, welfare funds, feather-bedding issues, and work-jurisdiction questions.

entrusted with working out certain terms of the employment relationship. The nature of each of these steps is now examined.

Union Security

Previous reference has been made to union security as a phase of organizing employees effectively for collective bargaining.⁹¹ Union security clauses unquestionably impose obligations upon some individual workers contrary to their will. This is inevitable if that complete organization prerequisite to attainment of union objectives is to be achieved. It is also related to not thwarting the desires of the majority of employees. Protection is given by the Taft-Hartley Act to the right of individuals not to conform either to a union organization program or to a union policy.⁹² Any resulting diminution in the strength of labor organizations is apparently conceived as a desirable method for redressing the balance of power between unions and employers.

Although union security is an important phase of union organization, employer interests are also involved. For this reason, union security has traditionally been looked upon as one of the subjects to be dealt with in collective bargaining. Consider some of the plant problems that are related to union security! Discipline of an employee for getting into bad standing with the union has a bearing upon management's ability to keep the plant running efficiently. But many an employer has come to see management advantages in the use of union security to guard against disruptive jurisdictional disputes and to make the union responsible for meeting its contract commitments.

Protection of the individual rights of employees, including the right to act irresponsibly toward a labor organization and a labor agreement, has to be weighed against stabilized in-

⁹¹ See pages 44 and 45.

⁹² Except that a majority of the employees in a bargaining unit may impose certain obligations upon all employees by voting for an "approved" union shop.

dustrial relations and low operation costs. Management representatives often have a deep interest in union security as an aid to low-cost plant operation. They sometimes say, "We'd prefer not to deal with a union at all. But if we have to, let us deal with a strong union and not a weak one."

Whenever stabilization of the conditions of employment between competing concerns has been adopted as a sound employer policy, management has invariably been quite willing to support a "strong" union-security program. The union is expected to "control" employees and sometimes to "police" the working conditions of employers to prevent the production of goods at "substandard" rates or conditions.⁹³ Strong evidence can be adduced to show the employer interest in the union-security question. Altogether too much discussion of it has unrealistically assumed that all employers are opposed to giving security to a union.

A "strong" union-security provision is most workable and defensible when it has the support of an overwhelming majority of the employees and where the employer also looks upon it as a stabilizing factor. The clause can then be viewed not merely as a means of depriving individual employees of their private rights but of assuring their responsibility to the program supported by a majority.⁹⁴

Despite these cogent considerations, the closed shop has been entirely outlawed, regardless of its acceptability to the employees as a group or to the employer.⁹⁵ In addition, the

⁹³ The union is held responsible, in other words, for preventing any employee from working below the standard scale and thereby giving a competitive advantage to a particular employer. Sometimes the union must agree that relatively favorable terms of employment secured by any one employer will be made available to all employers. This is the "most favored nation clause" in industrial relations, and it is usually an employer demand. In addition, discipline of union members for violations of the agreement, including interferences with production contrary to a no-strike clause, has been deemed by many employers to be a proper union function.

⁹⁴ Union obligations will then be imposed upon a relatively few employees and only because their assumption of obligations is essential to carry out a program that has an overwhelming support behind it.

⁹⁵ Protection of the rights of individual employees cannot reasonably be looked upon as the sole reason for this proscription. After all, the principle

"standard" union shop as previously included in labor agreements and the previously widely used maintenance of membership clause are no longer permissible. Both the union shop and the maintenance clause may be used only in conformance with certain prescriptions and proscriptions.

A "union shop" has long meant that all employees were obligated to join a union⁹⁶ and to maintain their good standing in the organization as a condition of employment. A similar obligation went with maintenance of membership, but only as respects those employees who voluntarily joined the union in the first place. Management has long had the right to discipline employees, including use of the discharge penalty, for conduct inimical to the efficient operation of a business. In acquiescing in a union shop or a maintenance clause, management fundamentally agreed that its employees were responsible for fulfilling their obligations to the organization with which the company was legally required to deal. If employees failed to do so, they would not be "efficient" employees and would subject themselves to discharge. It could be said that union security added one more qualification to a job description—willingness to belong to a union.

The requirement of good standing in the labor organization formerly was determined entirely in accordance with union rules. In essence, the union was given the right to initiate disciplinary action against an employee. Discharge

that the majority of workers can impose obligations on a minority is approved by the Taft-Hartley Act in provisions made for instituting a union shop. Elimination of the closed shop seems rather to express a dissatisfaction over that kind of collective bargaining that was carried on between a closed-shop union and employers who wanted to "stabilize" their industry. There is a fear, supported by evidence in a few instances, that such bargaining is carried on at the expense of the consumer. Regulation of collective bargaining rather than protection of the rights of individual workers seems to be the real purpose behind the union-security legislation.

⁹⁶ Within a specified number of days after their employment. Management retains the right to hire anyone it wants under a union shop. In contrast, membership in the union is a prerequisite to securing a job under a closed-shop clause.

could result from misconduct inimical to either the effective operation of the business or the union. Some unions abused their disciplinary power over the individual worker, just as some employers did before the unions came along. To avoid any discriminatory actions by a union toward its members, the pendulum has swung far in the opposite direction. Virtually all union control over its members has been removed. In addition, the responsibility of individual employees under a labor contract has been limited by law.

The union-security regulation of the Taft-Hartley Act provides, for all practical purposes, that no employee can lose his job except for failure to pay dues and initiation fees.⁹⁷ To a very large extent, therefore, the power of a union to discipline its members no longer exists. Certain abuses of their members by some unions are eliminated. So is the power of other unions effectively to pursue stabilizing objectives and to deliver on their contractual commitments. Many employers have a great deal to lose out of this state of affairs.

Great doubt exists as to the social desirability of the stabilizing or standardizing objectives of unions. Because such unusual obstacles have been placed in the way of union "control" over its members, it is fair to conclude that the protection of individual rights was incidental to, and perhaps mainly an effective rationalization for, the main purpose of trying to forestall the labor movement from attaining its time-honored objectives. Analysis of the prescribed route for gaining even a highly restricted form of union security lends substance to the conclusion.

⁹⁷ The applicable words in Section 8 (b) 3 are: "That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or maintaining membership."

To begin with, the modified union-shop provision cannot be made effective unless a majority of the employees in a bargaining unit authorize the union, by secret ballot conducted by the National Labor Relations Board, to operate under the security of the clause. Such authorization can only be given by a majority of those in a bargaining unit and not by a majority of employees who vote. An unusual responsibility for "getting out the vote" is placed upon the union. Every employee who refrains from voting is counted with those who vote against authorization. Whatever justifications may be advanced, such voting procedures tend to "stack the cards" against any form of union security.⁹⁸

Use of the balloting procedure would seem, on the surface, to place control of the union-security demand in the hands of employees and to take it away from union officials. But, this principle is actually not upheld at all. Employees have no opportunity at all to express how they feel about making a demand upon the employer for a closed shop, for the traditional union shop, or for the "standard" maintenance clauses. These cannot be demanded of an employer even though they may be overwhelmingly desired by the employees. In short, unions are not to be permitted to control jobs as in days past, regardless of the wishes of the employees—or of the employer for that matter.⁹⁹

The union's ability to carry out commitments under an agreement is weakened at a time when great cries are raised about the need for the assumption of greater responsibility by labor organizations. One can confidently expect that the cost incidence of the government regulations over union

⁹⁸ Any hope that employees would withhold the authorization in question seems to have been largely dispelled by the large majority votes cast in favor of the union shop in practically all the balloting held up to this writing (July 1948).

⁹⁹ The Act does provide, in Section 8 (b) (1), that a labor union may "prescribe its own rules with respect to the acquisition or retention of membership." At the same time, conformance of an employee with such rules cannot be made a condition of employment except as respects the payment of dues and initiation fees.

security will be heaviest where joint dealings have been focused upon "stabilization" of industrial relations throughout an industry.¹⁰⁰

One further characteristic of the government's prescription for a proper union-security clause should be mentioned. In reality, the approved clause relates much more to "dues security" than to "union security." An employee's obligation to pay dues to his union is the only responsibility of the union member that can be enforced.¹⁰¹ Yet, still further government regulations must be met if those dues are to be paid through check-off.¹⁰² As will be noted presently, the Taft-Hartley Act is particularly confused in dealing with this subject.

By the terms of the Act, payment of dues can be made a condition of employment under the approved union-shop clause. When it is, advantages can be secured in many situations by unions, management, and the employees through use of a check-off to collect dues. Interference with production, entailed by collecting dues from employees on the job, is avoided, and the occasions when discipline has to be invoked for nonpayment of dues are limited. If dues payment can legally be required, one might logically expect that labor and management would be allowed to select the ways for seeing to it that the dues are paid in an orderly manner.

¹⁰⁰ It is significant, in this connection, to recall the rush of unions and employers to sign up closed-shop contracts in such situations after enactment of the Taft-Hartley Act on June 23, 1947, but prior to the effective date of the ban on the closed shop in new contracts—sixty days after passage of the Act. During this period, for example, the Amalgamated Clothing Workers and the manufacturers' associations with which they deal agreed to an extension of their closed-shop agreement for five years. In view of such efforts to adjust to the Taft-Hartley Act, it is not possible to look upon the government regulation of union security as solely an anti-labor measure. The interests of many employers were also adversely affected.

¹⁰¹ Prior to the passage of the Taft-Hartley Act, the "free rider" argument apparently made a deep impression. Since all employees shared in the gains won by the union, all should contribute money, but nothing else, to the union's support. Union security was thus made synonymous with the employee's obligation to pay dues.

¹⁰² Under a check-off provision, the employer deducts union dues from the employees' pay and turns them over to the union.

Instead, complicated and restrictive government regulations over dues payment have been put into effect.

Dues check-off is not banned, but the so-called "automatic check-off" is. The means for authorizing dues deduction has been brought under government regulation. On the automatic basis, management's authorization to check-off the dues of all union members derives from an approval given by a majority of employees at a union meeting. In addition, where an "escape" period is provided,¹⁰³ individual employees may exercise their individual rights not to be bound by that particular majority action of the union. These so-called automatic authorizations have been banned. Union dues may now be checked off by an employer only for those employees who individually furnish a written assignment binding for a period of not more than one year.

Whether the check-off of union dues should be contingent upon written authorization by individual employees or approvable by an automatic method is a debatable point. It can be reasonably argued that no allocation of an employee's wages should be made without his express consent. Many unions oppose a check-off. They feel that union-dues collection is not the employer's business and that periodic visits of members to the union hall to pay dues helps build up the union.

Without delving into these questions, it may be noted that wherever labor and management agree to use the government-approved dues check-off, relatively few advantages are gained by incorporating the approved union-shop provision in the same agreement. Non-tender of dues is the only basis upon which the union can request the discipline of an employee under the union-shop clause. Greater security is provided over the approved dues check-off only in requiring

¹⁰³ Under the "standard" maintenance of membership clause, obligations to the union devolve upon all members who do not avail themselves of an opportunity to withdraw from the union during the fifteen days following the signing of an agreement. The time when they may withdraw is commonly referred to as "the escape period."

every employee to pay union dues, either by check-off or otherwise, and in extending the dues-payment obligation to new employees.¹⁰⁴ The dues authorization is revocable and so is the union-shop authorization by employees. On the other hand, the dues deduction must be authorized every year, whereas a union-shop authorization presumably continues until specifically revoked.

It is with the labor contract including both the union-security and the dues-collection plans approved by the Taft-Hartley Act that confusion may result. Two classes of employees are created on the basis of different dues-paying obligations. Those who sign voluntary check-off authorizations are in one class; those who choose to pay their dues in some other way, presumably to be specified by union rules, are in another. Not much more than the right of each individual employee to choose between two methods of dues payment is preserved by the ban on so-called automatic check-off. Whether this is such a substantial result as to justify action by the government in outlawing other methods of authorizing the check-off of dues seems rather doubtful, to say the least.

By legally requiring the use of a particular kind of union security only and of a certain method of dues check-off, the government has substantially deprived management and unions of their latitude in dealing with a major term of employment. Relatively "strong" forms of union security are outlawed. "Weaker" kinds of clauses can be gained only after several obstacles have been surmounted.

Uncommon clauses, developed to meet the needs of particular situations, have been placed in jeopardy by an emphasis upon standard clauses. In some cases, for example, a

¹⁰⁴ A union that loses an employee vote for authorization to negotiate for a union shop could theoretically use a voluntary authorization for check-off to gain union security. From a practical standpoint, it would not be apt to do so. Loss of the vote would indicate a lack of employee support. If only a relatively few employees acceded to check-off, union weakness would be further emphasized.

union has been willing to forget about the usual security clauses in return for a management commitment to cooperate informally with the union in "educating" all employees about their obligations to the labor organization. Pressures within the union to go for the union-shop provision suggested by the Taft-Hartley Act can readily be generated. An employer need not "grant" that provision, but he will be hard put to withhold agreement to it after a majority of his employees vote for a union shop in an election held under government auspices.

The union-security issue is not "solved" by the regulations now on the statute books. Union "control" over its members has been greatly restricted for the time being. A theory of limited responsibility of union members has been applied. New problems are thereby created for management as well as labor. Not only will some established relationships be adversely affected, but substitutes for union security will surely be sought.¹⁰⁵ Renewed demands for welfare funds and pension plans will doubtless be made upon the employer in this connection. Nor should one ever lose sight of the fact that union-security regulations have been made dependent upon political power. If Congress in 1947 could specify a modified union shop as the limit of union security, another Congress at another session may "settle" the issue in a quite different manner. In the regulations on union security, one can best appreciate some of the problems that are created when the government determines substantive conditions of employment.

Welfare Funds

The increasing scope of the collective-bargaining relationship has been accounted for very largely by an expansion of

¹⁰⁵ Many "informal understandings" have already been reached, even though they may be contrary to the spirit of the law, if not its letter. Some criticism has been directed against employers who have entered upon such understandings. But criticism can also be directed against a law that impels people to engage in such actions as the only way of meeting their practical problems.

union objectives to include provisions for health and medical services, pensions, unemployment benefits, and the like. Such clauses have generally been asked for either in addition to wage increases sought or in lieu of a specified part of an available wage increase.¹⁰⁶ Wage collaterals, sometimes called the fringe issues, already represent a sizeable percentage of the total outlay for direct labor in many industries. They show signs of increasing in importance throughout industry.

The control and the administration of welfare funds established through collective bargaining have been made the subject of government regulation by the Taft-Hartley Act.¹⁰⁷ Funds contributed for welfare purposes by the employer in conformance with the terms of a labor agreement have long been administered solely by the union in a number of industries. Notably in the needle trades, such welfare funds have been in operation for many years. Nor have they been opposed by employers as a matter of principle. Most of these employers are in accord with the objectives of such funds and, in times past, were content to let the union manage them. Under free collective bargaining, the parties were free to institute and to operate welfare funds as they saw fit.¹⁰⁸

Suspicious and doubts did not originate with dissatisfaction over those union-operated welfare funds that had long

¹⁰⁶ It is the request for inclusion of welfare provisions in the labor contract and contributions for its support by the employer that is new. Many unions have long operated their own welfare funds, to which members contributed, and have opposed employer-operated funds as "union busting." The new emphasis is closely related to union-security questions. It will likely become a stronger emphasis as an offset to restrictions upon union security. If employees can't be directly "controlled" by the union, welfare clauses can be designed to make union membership a matter of self-interest to the employees. This end could be served, for example, if benefits of a health program, centering in the union headquarters, were available only to union members.

¹⁰⁷ These regulations are to be found in Section 302 of the Act, entitled "Restrictions on Payments to Employee Representatives."

¹⁰⁸ Union-managed funds were set up, in some instances, in full recognition of the fact that they contributed to union security. Some employers look upon this as an advantage and not as a disadvantage.

been established. Demands for employer contributions to union-managed funds in the form of \$.05 for every ton of coal mined or \$.01 for every musical recording for reproduction gave rise to the demand for government control over welfare funds.¹⁰⁹

A new issue was framed: Can unions secure, through collective bargaining, a right to tax the products of industry? When some labor organizations further insisted upon the sole right to administer and to expand funds created by "private taxation," a great majority of the public became alarmed. A vast power seemed to be within the grasp of unions. When some union leaders insisted that they should not be held accountable in any way for their custodianship of the large sums involved, they failed to recognize those minimum requirements of trust-fund operation that are demanded by the public.

In order to assure that welfare funds set up by collective bargaining are used exclusively for the benefit of employees, the Taft-Hartley Act makes it unlawful for an employer to contribute to any welfare fund except under a trust established "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees' families and dependents jointly with the employees of other employers making similar payments, and their families and dependents)." ¹¹⁰ The purposes for which payments can be made from such a trust are specifically restricted to protection against various, listed forms of social insecurity.¹¹¹ The uses to which any particular trust fund

¹⁰⁹ Most of the funds in the needle trades were made up by employer contributions equivalent to a certain percentage of the payroll. Since they were thus linked to wages and not to units of product produced or sold, they could more readily be considered as a part of the wage bill.

¹¹⁰ The requirement is in Section 302 (c), Paragraph 5, of the Act. It prohibits the use of such funds for general union purposes.

¹¹¹ The purposes are, however, quite broad. They are "medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits, or life insurance, disability and sickness insurance, or accident insurance."

may be placed must, furthermore, be specified in detail in a written agreement between a union and the employer.

A number of administrative requirements for the operation of welfare funds are also specified. Control of such funds may not legally be in the hands of the union alone. Employers must have equal representation with the employees on the administrative agency, together with such neutral persons as they may agree upon. Any "deadlock" over the administration of the fund must be resolved by arbitration. Other regulations of welfare funds are provided in the Act, but those just recited are the notable ones.

Strong reasons can be advanced to justify government regulation of large funds accumulated by a union in its capacity as bargaining representative for the employees. Whether or not abuses in the operation of previously established funds or the threat of an unduly augmented union power through control over such funds called for the regulations now on the statute books has been and will continue to be subject to wide differences of opinion. Even if the government regulations are appraised as eminently fair and reasonable in specifying the purposes for which welfare funds may be created, Congress limited the latitude of organized labor and management in resolving their differences. And though they have characteristics that elicit general approval, the welfare-fund regulations do represent a further example of the extension of governmental jurisdiction over substantive issues of industrial relations. Management and a union need not agree upon a welfare fund, but they can only establish one that conforms to the regulations laid down in the law.¹¹²

¹¹² A recent incident is of some interest in this connection. A local welfare fund was created some years ago by employer contributions but it was administered solely by the union. After passage of the Taft-Hartley Act, the employers were called upon to participate in the administration of the fund. They were reluctant, if not quite averse, to taking on any such responsibility—that could entail future and unforeseen obligations on their part to make additional contributions to effectuate the objectives of the fund.

Feather-bedding

A union will commit an unfair labor practice under the Taft-Hartley Act if it causes or attempts to cause "an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."¹¹³ Complaints arising under this section will be decided by the National Labor Relations Board. Those agreement terms that have been outlawed by the Act will have to be decided by a government agency and by the courts. Substantive terms of employment have again been removed from determination by organized labor and management.

An intent to prohibit labor and management from agreeing to such practices as employment of stand-by musicians or of local pilot drivers for out-of-town trucks has been widely talked about in connection with this regulation. Public demand for the elimination of such practices indicates the connotation popularly ascribed to the words "feather-bedding" and "exaction." Whether or not the mentioned practices have been effectively dealt with is not the principal point of interest. Of much greater significance is the question: What does the remedy provided in the Taft-Hartley Act prohibit in addition to the possible elimination of those forms of feather-bedding that have long been pointed out as the horrible examples?

The question just propounded is of unusual concern to unions and to management because the labor-agreement terms proscribed by law are yet to be worked out in a definitive way.¹¹⁴ Organized labor and management will be bound by rulings of a quasi-judicial governmental agency and the courts for answers to some very practical matters of

¹¹³ This anti-feather-bedding regulation is set forth in Section 8 (6) of the Taft-Hartley Act.

¹¹⁴ The anti-feather-bedding rule is so far little more than a statement of the government's intention to regulate an area of industrial relations.

plant operations. And the rulings must be related to the law rather than to standards of good collective-bargaining practice.

In the meantime, negotiators are on notice that making agreements to dispose of a number of problems involves some peril. Industrial-relations problems ranging all the way from payment for time spent by employees waiting at a plant for work to severance pay for employees displaced as a result of technological improvements now have to be appraised in relation to the ban on feather-bedding. For the time being, at least, negotiators will have to work in the dark about what can legally be agreed upon as a mutually acceptable solution for some difficult problems.

An example will better illustrate the point. What about a union proposal that some financial provision be made for employees who lose their jobs through the introduction of labor-saving machinery? Even though he might be convinced of the equity and feasibility of the union proposal, an employer might be convinced that such a payment would be illegal because it was "in the nature of an exaction" and constituted an attempt to cause an employer to deliver money for services not to be performed. The anti-feather-bedding provision would be something of a boomerang if, in the hypothetical case, it caused the employer to continue operation of the old machinery and to shelve improved equipment because the employees refused to operate it.

No government ruling on the question of dismissal pay as just outlined would be free of objections. A decision that severance pay was prohibited by law would leave the fundamental problem unsolved. Nor would approval of severance allowances, as compatible with the requirements of law, be helpful to industrial relations. Such a decision would inevitably be interpreted as an approval by the government of the general principle that severance pay should be given upon the introduction of labor-saving machinery. And, of course, severance pay may be appropriate

under one set of circumstances and inappropriate under others. The idea of collective bargaining is that such matters should be variously worked out to meet the circumstances of particular cases. Government regulation of these agreement terms cannot fail to introduce inflexibilities and rigidities into industrial relations.¹¹⁵

It may be possible to distinguish clearly and precisely between payments for services not performed that are patently undesirable and those that are necessary and worthwhile methods for solving certain industrial-relations problems. That is, however, a most formidable undertaking.¹¹⁶ Unless a workable and a practical definition of feather-bedding is evolved, elimination of practices that almost everyone abhors may be accompanied by a serious road-block in the way of collective bargaining over some serious problems. Government regulation of these substantive terms of employment may have disadvantages as formidable in their own way as the abuses that came out of collective bargaining.

Jurisdictional Disputes

Reference was made earlier in this chapter to various procedures established by the Taft-Hartley Act to induce those concerned with work-jurisdiction disputes to settle their differences by agreement.¹¹⁷ Unlike the procedural rules applicable to emergency disputes, government action with regard to jurisdictional disputes extends into an evaluation of the merits of contesting positions. If no agreement is

¹¹⁵ A vast experience to support this observation was accumulated during World War II. One of the policies of the War Labor Board, for example, was to approve vacations up to one week for one year's seniority and of two weeks for five years of seniority. Such provisions could be ordered in dispute cases and were also held to be within the limits of the wage stabilization rules. Although the "standard" was a limit, it became the general vacation provision just the same. Regulations on feather-bedding may not introduce such extreme rigidity, but they will be of the same nature.

¹¹⁶ In passing, it may be remarked that the tripartite board is peculiarly adapted to the solution of this kind of problem. That should be apparent from the War Labor Board experience. See pages 154 to 161.

¹¹⁷ See pages 273 and 274.

reached between the parties themselves, the National Labor Relations Board must determine who is to perform disputed work. Substantive matters of employment will then be decided by the government. To carry out this policy, compulsory arbitration of persistent work-jurisdiction disputes has been introduced.¹¹⁸

A considerable support for compulsory arbitration of work-jurisdiction disputes comes from the inappropriateness of stopping production in order to settle an argument between two unions about which one's members should do certain work. An employer's interests are adversely affected even though he sometimes doesn't care who does the work as long as it gets done. Most work-jurisdiction strikes are not undertaken to exert pressure on the employer at all. Their purpose is to preserve the disputed work for those union members to whom jurisdiction is ultimately granted.¹¹⁹ Where the work held in abeyance has "bottleneck" characteristics, excessive production losses and unemployment to other workers not directly involved in the dispute is frequent unduly oppressive.

As a matter of abstract principle, most unions agree that work-jurisdiction strikes are inappropriate and that the labor movement has a responsibility to eliminate them. Union leaders commonly recognize and freely admit that the

¹¹⁸ Compulsory arbitration is but one of the remedies proposed for work-jurisdiction disputes. Under Section 8 (b) 4 D, it is an unfair labor practice for a union to force or to require any employer "to assign particular work to employees in a particular labor organization, or in a particular trade, craft, or class . . ." Action of the board respecting this kind of unfair labor practice may be enforced, in "situations where such relief is appropriate" under Section 10 (k) (1). This section provides for priority treatment and allows a petition for "appropriate injunctive relief pending the final adjudication of the Board . . ." Under Section 10 (k), the National Labor Relations Board "is empowered and directed to hear and determine the dispute." In addition, under Section 303 (b), "whoever shall be injured in his business or property" by a work-jurisdiction dispute may sue therefor in any district court.

¹¹⁹ Matters of principle are also involved. Performance of disputed work by one craft or trade may be used as evidence that its members are "entitled" to it in the future.

labor movement should set up its own machinery for the peaceful adjudication of these disputes. These sound principles were not adequately carried out in the past. Time and time again, failure marked the efforts of unions—mainly within the American Federation of Labor—to establish procedures for dealing with the problem. Enough work stoppages resulted to create a deepseated dissatisfaction over the situation both within and outside the labor movement.

One may be “against” work-jurisdiction strikes and still remain entirely unenthusiastic about the remedy for them incorporated in the Taft-Hartley Act. Whether or not the cure is worse than the disease remains to be seen. Compulsory arbitration could turn out to be as troublesome and disadvantageous as the work stoppages.

In the last analysis, the government proposes to deal with work-jurisdiction disputes through a National Labor Relations Board determination as to who will perform disputed work. This is not an issue in which the employer always lacks interest. Different classes of workers receive different rates of pay. They adhere to varying working conditions that affect the cost of production. From the employee’s standpoint, decisions to be made through compulsory arbitration will also determine the pool of job opportunities that will be available to particular groups of employees.

Important judgments relating to business operation and to union jurisdiction are to be made, therefore, by a government agency. Management and the unions have lost control over a not unimportant phase of their relationship. One real concern relates to the possibility that rigidities and inflexibilities may be introduced if wide and general application is given to Board rulings made in particular cases. These rulings will almost inevitably have an effect upon work assignments all over the country. As matters stand, variable local and regional practices have been built over the years. It is to be hoped that the law does not operate to

require uniformity and thus create more work-jurisdiction questions than it avoids.

Constructive results will come from the government plan to eliminate work jurisdictional disputes only if avoidance of very great risks inherent in the Taft-Hartley Act procedure induces those who would be affected by the government regulation to work out their own programs for settling these disputes. In this connection, the National Joint Board for Settlement of Jurisdictional Disputes in the construction industry represents a notable accomplishment. The parties in this industry were finally induced to develop voluntary arbitration in order to avoid application of the Taft-Hartley Act procedures to their problems. This is undoubtedly a salutary result of the Act.

Summary

In four areas, then, government jurisdiction over industrial relations has been extended to the fixation of substantive conditions of employment. Regulations over union security and welfare funds specify directly those limits within which labor-agreement terms may be evolved. As respects feather-bedding, the government has adopted a program for eliminating certain practices that have yet to be specified in detail. It is up to the National Labor Relations Board and the courts to differentiate between those payments for work not performed that are permissible and those that are proscribed. Finally, work-jurisdiction disputes have been made unlawful. The National Labor Relations Board is responsible for telling management and the unions, in persistent disputes, which craftsmen shall be assigned to particular work.

These areas of regulation over substantive terms do not add up to any wholesale government regulation of the conditions of employment. If the union-security regulation is excepted, not much enforced relinquishment of latitude and

judgment by management or by unions is brought about by law. The regulations were directed, moreover, toward the elimination of very real problems over which deep public concern had developed.

Neither the relative shortness of the regulatory steps taken nor the fact that they interfere primarily with certain union programs and practices should be permitted to obscure the nature of the policy under which they were inaugurated. Regulations in the four areas under discussion were promulgated as part of a significant revision of the national labor policy under which government assumed jurisdiction over the terms and conditions of employment. Among the stated policies and purposes of the Taft-Hartley Act is an intention "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce" and "to define and proscribe practices on the part of labor and management which affect commerce." The government jurisdiction to prescribe and to proscribe in the field of industrial relations finds its most far-reaching expression in the designation of the employment terms just referred to. They are evidence of the extent to which government-regulated collective bargaining has been substituted for free collective bargaining.

JOINT COMMITTEE ON LABOR-MANAGEMENT RELATIONS

Whether the Taft-Hartley Act goes too far or needs to be extended is still a moot question. A movement for outright repeal was inaugurated by organized labor as soon as the law was passed. Other voices cry out that, while the Taft-Hartley Act is a good "first step," amendments are needed to restrict more effectively the monopoly and job-control powers of unions. A decision as to whether we are to have more or less government regulations will sooner or later have to be made.

The tentativeness of the national labor policy now em-

bodied in the Taft-Hartley Act is underlined by that Section of the Act that creates the Joint Committee on Labor-Management Relations.¹²⁰ Composed of seven members from each House of Congress, the Committee is responsible for conducting "a thorough study of the entire field of labor management relations." In submitting its report to the Senate and to the House of Representatives, the Committee is expected to make "recommendations as to necessary legislation and such other recommendations as it may deem advisable. . . ." ¹²¹

Considerable interest attaches to the investigations that the Committee was instructed by Congress to make.¹²² They give a clue to the possible scope of government supervision or regulation of industrial-relations activities that is subject, at least, to discussion. One of the subjects of study assigned to the Committee, for example, is "the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit sharing and bonus systems." Another is, "the methods and procedures for best carrying out the collective bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy." Committee investigation of "the labor relations policies and practices of employers and associations of employers" is also directed.

Whatever recommendations for further legislation are made by the Joint Committee, its agenda is ample evidence that the great issue of industrial relations—collective bargaining vs. government regulation—is far from settled. The Taft-Hartley Act could go down in history either as a

¹²⁰ Created under Title IV (Sections 401 to 407, inclusive) of the Act.

¹²¹ A due date for a preliminary report was set as March 15, 1948, and a final Committee report must be filed "not later than January 2, 1949." The preliminary report is on file as Senate Report No. 986 of the 80th Congress, 2d Session.

¹²² The study and investigation authorized by Congress includes specifically mentioned subjects but is not limited to them.

first step toward sweeping government regulation or as a temporary departure from primary dependence upon largely unregulated collective bargaining as the basis of our industrial relations.

COMPONENTS OF THE NATIONAL LABOR POLICY

Not much point is served in arguing about whether or not the Taft-Hartley Act is a mild or an offensive piece of legislation. It might appear to be mild if considered solely in relation to the collective-bargaining breakdowns and other provocations that caused the public demand upon Congress to "do something." More drastic legislation might have been passed. Certainly the "slave labor" tag that union leaders seek to attach to it reflects an emotional depth rather than a cold appraisal of the Act. On the other hand, the idea that the Act is outright pro-employer is also erroneous.

The Taft-Hartley Act actually constitutes the inauguration of government-regulated collective bargaining. A full awareness of that fact and an understanding of the regulations already imposed are minimum necessities for making up our minds about the soundness of the direction in which we are going.

Free collective bargaining, as previously described,¹²³ has few all-out supporters in the ranks of labor, management, or the public. Resolving every industrial-relations issue by the uninhibited use of economic power as the final arbitrament constitutes neither an acceptable nor a workable policy.

When the Wagner Act was passed, the country decided that the right of employees to representatives of their own choosing should not be dependent upon the power of employees to win a strike. Organization rights should be guaranteed by law. The Fair Labor Standards Act reflects a well-considered judgment that employers should not be permitted to pay substandard wages, even if they possess

¹²³ In Chapter I.

an economic power to force employees to work at such wages. Especially in recent years has it become evident that some industry-wide strikes and also stoppages in public utilities put much more pressure upon the government to intervene than upon the parties to settle their dispute. Other instances of the inadequacy of totally free collective bargaining could be cited. Those mentioned suffice as examples of some very cogent reasons why a national labor policy limited to free collective bargaining is neither practical nor desired.

The problem of devising a national labor policy revolves around the ways in which free collective bargaining should be modified. One of the tests to apply to any regulatory proposal is whether or not reasonable regard has been given to preservation of the latitude and the judgment that management and union representatives may exercise in working out their problems. That test is fundamental in a country dedicated to the proposition that relative freedom from government direction is essential to what we call a democratic way of life. We also hold a conviction that high production can best be achieved if those responsible for turning out goods are left relatively free to work out solutions to their own problems.

When any government regulation is undertaken, moreover, strong reasons for the intervention should exist. The purposes should not only be highly desirable from a social point of view, but they should be otherwise unachievable. It should appear, further, that the government can do the job in hand better than individuals or private organizations acting on their own. These various tests are especially appropriate in the industrial-relations field. It cannot be assumed that government regulation is *per se* better than collective bargaining. The many shortcomings of collective bargaining and the abuses that have occurred in its practice have to be balanced against the disadvantages of government regulation.

The first broad attempt to formulate a national labor

policy was through the Wagner Act. Government assistance was not extended to employees in organizing their unions until it had first been convincingly demonstrated that, in the absence of such a policy, the right of employees to organize would be thwarted. Employees never gave up their efforts to organize, despite the odds against them, so that the economy was plagued with recurrent organizational strikes. Those strikes were frequently characterized by violence and distress. Government's decision to aid employee organization was for the purpose of developing collective bargaining as a stabilizing institution. By bringing about a stabilization of wages and working conditions and by increasing the worker's purchasing power, collective bargaining was to be a strong bulwark against depressions.

Despite the fact that the national policy of the Wagner Act was promulgated at a time when wages and working standards were badly demoralized, only a limited modification of free collective bargaining was made. Government intervention into industrial relations was almost entirely restricted to the organizational steps preliminary to collective bargaining itself. Certain acts of employers were proscribed. But, the objective was to assist employees to organize and thereby gain an ability to help themselves. Once workers organized, their representatives and management's representatives retained the widest kind of latitude in resolving their differences. They could work out their problems in whatever way they saw fit and by such means as they might choose under a system in which an exercise of their own economic strength was the final arbitrament. By the tests mentioned above, the Wagner Act was a not unreasonable extension of the government's jurisdiction.¹²⁴

¹²⁴ Two pieces of evidence further support this conclusion. Few demands were ever expressed for outright repeal of the Wagner Act. In addition, many of the severest critics of the Wagner Act have concluded, "The law was all right. The trouble was with the way in which it was administered." Dissatisfaction with "bureaucratic administration" will be as vocal under the Taft-Hartley Act as under the Wagner Act.

Unions were widely established under the protection afforded by the National Labor Relations Board. Whether or not their activities do constitute an effective bulwark against depression has yet to be tested. Our principal experience with the economic consequences of collective bargaining was gained in the decade from 1937 to 1947. That was a time of unparalleled demand for goods, of a scarcity of employees, and of highly profitable business. Guarding against a depression was not the immediate problem. Protecting against inflation was. When the Wagner Act was passed, downward wage spiraling, accentuated by individual bargaining, held the spotlight. In 1947, the prominent position in the center of the stage was taken over by restrictions on production and the upward wage-price spiral.

The Wagner Act was a product of the 1929 depression. It contemplated stabilization of working conditions within and between industries by collective bargaining as essential to the maintenance of a private enterprise system. The Taft-Hartley Act was a product of the inflationary movement that followed World War II. Employees did not then so urgently need the assistance of government in mobilizing their economic power to defend against a demoralization of their standards of living. Even the unorganized employees did reasonably well for themselves. In consequence, collective bargaining didn't seem to be nearly so essential to national well-being. On the contrary, unionization often seemed to add unduly to that significant economic power of employees that derived from the "scarcity of labor." In 1947, the use of union power to secure advances in employee standards of living was put under scrutiny.

It is difficult, if not impossible, to formulate a single national labor policy adapted to the various phases of the business cycle. Under conditions of a scarcity of labor, rising profits and wages, and an almost insatiable demand for the products of industry, one can easily conclude that, from the national standpoint, it is rather immaterial whether

collective bargaining prevails or does not. Nor is there a pressing need to encourage collective bargaining as a matter of simple equity to wage earners. They do not cry out insistently for the means to protect themselves. Formation of unions possessing a complete control of the jobs in an industry or a plant should be discouraged if views engendered by the fear of inflation are accepted. In addition, the uses to which unions may put their power should be circumscribed—employees don't need all the aids for improving their status that previously seemed necessary. These were the prevailing attitudes that supported the Taft-Hartley Act.

By the tests mentioned earlier in this summary, the Taft-Hartley Act falls far short of providing a sound national labor policy. It extends government regulation into areas where decisions could be better made by organized labor and management. Legal requirements have been promulgated without reasonable likelihood that results will be any improvement over collective bargaining. Regulation of union security is an example. During the first year under the Taft-Hartley Act, enough experience accumulated over the union-security provision to support a reasoned judgment that this particular attempt of government to specify substantive terms of employment was a failure. Similar evidence was being accumulated with respect to the regulation of welfare funds. At any event, disputes of critical magnitude were generated in the bituminous coal industry during 1948 over the application of the Taft-Hartley welfare provisions to the necessities of that industry. Nor did the provisions of the Act assist in an orderly and equitable disposition of this problem.

The times and the public temper called for government action in 1947, just as they did in 1935. "Something" had to be done. A sound change in policy could have been made in 1947 by the passage of legislation (1) to revise union organizational rules, without giving assistance to the creation of dual-unionism or to re-creation of individual bargaining

and without ignoring employee-responsibility questions; (2) to require collective-bargaining procedures in specific terms (such as provided for the negotiation of expiring agreements) to assist the agreement-making process; and (3) to set up procedures for handling national emergencies along lines followed in the Act. Concentration upon these matters would not have constituted a pell-mell rush, without guides or experience, into unexplored areas. A labor policy so based would also have recognized the national interest in building up collective bargaining rather than precipitately by-passing it in favor of legislated regulation. Government-regulated collective bargaining as a national policy was, at least, prematurely inaugurated.

Chapter VII

THE FUTURE OF COLLECTIVE BARGAINING

GOVERNMENT-sponsored collective bargaining was the labor policy of the Wagner Act. Government-regulated collective bargaining is the essence of the Taft-Hartley Act. Between the adoption and the regulation of collective bargaining, only a short, though crowded, twelve years intervened. During four of those years, from 1941 to 1945, government supervision of labor-management relations was extensively instituted to serve as an aid in the effective prosecution of World War II.

Methods for dealing with "the labor problem" in recent years have tended to be strongly in the direction of increasing government regulation and control. That trend is ample cause for disturbing concern to those who still believe in industrial self-government as the sound way to achieve both maximum production and the greatest personal freedom. There can be no denial of the fact that disillusionment about the prospects of ever attaining that goal is the popular mood. The disillusionment is largely responsible for the trend in national labor policy.

The national program is essentially designed to maintain industrial relations on as even a keel as possible through a balance-of-power policy.¹ Neither organized labor nor man-

¹ The policy was initially introduced by the Wagner Act when it was decided to give government assistance to the formation of unions in order to create "an equality of bargaining power." The policy was carried forward under the Taft-Hartley Act.

agement is to be permitted to possess sufficient power to effectuate its demands unilaterally. Neither is it to be permitted to exercise its power to enforce greater demands through collective bargaining than is deemed to be socially desirable.²

At the government's disposal, in effectuating its balance-of-power policy, is an ability to give to or withdraw assistance from one side or the other. Government can also put hindrances in the way of either side. The process of adjustment is never completed. What constitutes "equality of power" is a variable. It depends upon public appraisals, from time to time, of the "legitimacy" of the objectives that are pursued.

A balance-of-power policy will assure peace and harmony in industrial relations no better than it did, over the years, in the field of international relations. An increasing emphasis will doubtless be placed upon political activity as the source of power with continuance of the balancing policy. In addition, that policy apparently leads to direct specification by the government of the conditions of employment. Withdrawal of the power to secure a particular demand, such as industry-wide bargaining, can readily be expanded into a direct outlawry of the demand itself.

Merely deploring the trend toward increasing government regulation of industrial relations isn't very constructive. To get to the heart of the trouble, one has to discern the collective-bargaining inadequacies and failures that spark the trend. Industrial self-government remains no more than an idea and a challenge in many industries and plants. It is entirely rejected in others. In some respects, the shortcomings of collective bargaining are exaggerated and

² Determination of certain substantive conditions of employment by the government goes a step beyond indirectly influencing those conditions by adjustments in the balance of power. Specification of substantive terms of employment in the Taft-Hartley Act seems tacitly to recognize the insufficiency of the balance of power adjustments that were made by the Act even before they became operative.

overdrawn. They were serious enough, at any event, to convince the overwhelming majority of the public in 1947 that the government "ought to do something." The consequences of collective-bargaining failures are written on the statute books for all to see.

Of all the questions raised by passage of the Taft-Hartley Act, the most important is whether collective bargaining is strong enough to meet adequately problems not yet dealt with by legislation. Organized labor and management are still responsible for dealing jointly with a host of perplexing problems. Seniority rights, discipline policies, regularization of employment, health and welfare funds, and the introduction of improved machinery are but a few. Above all, wage policies must be worked out. All these matters, and many others, have to be disposed of through collective bargaining. Or should they, too, be handled, directly or indirectly, by legislation?

A positive program voluntarily undertaken by labor and by management to improve their relationship should not be overlooked as one possible factor bearing upon the question of how much government control there will ultimately be.³ To attain improved industrial relations, with a de-emphasis on government control, collective bargaining will have to be conducted much more effectively by organized labor and management themselves. Legislative and administrative rules to bolster up collective bargaining, by requiring the parties to follow procedures that seem to facilitate agreement-making, won't suffice. Collective bargaining is much more than a series of procedural steps. It presupposes adherence to the philosophy that differences between labor and industry can and should be reconciled around the confer-

³Such a program is not likely as long as the Taft-Hartley Act is considered simply as pro-employer and anti-labor legislation. Attack and defense in the political arena will then be the methods that receive most attention. Recognition of the Taft-Hartley Act as legislation limiting the collective-bargaining rights of both labor and management is essential before a program of the type under discussion could be inaugurated.

ence table by understanding, compromise and agreement. Whether organized labor and management each holds this conviction—and it sometimes seems doubtful—is the master key to the future of collective bargaining.

Industrial self-government doesn't come about "naturally" after unions are organized and recognized by management. Nor will it come about by imposing certain formalities, reasonable though they be, in the way these parties deal with each other. Collective bargaining will be created as a sound institution only if organized labor and management first adopt its basic premise and then consciously devote their efforts toward developing the agreement-making potentialities of their joint dealing. To be *against* government regulation is not enough. It is also necessary to be *for* collective bargaining.

A great deal has been written and spoken about the fundamental importance to collective bargaining of the cooperative spirit. Without in any way deprecating the essentiality of that attitude, much more is required for successful collective bargaining. Without industrial-relations intelligence and "know-how," a cooperative spirit may be unavailing. A constructive development of collective bargaining calls for sustained attention to (a) the resolution of numerous conceptual differences that exist between organized labor and management and (b) the perfection and effectuation of the techniques of joint dealing. Some of the problems that must be dealt with in each category are hereafter suggested.

CONCEPTUAL PROBLEMS

Attainment of industrial self-government depends, in large measure, upon the ability of organized labor and management to agree upon a definition of collective bargaining. What is collective bargaining supposed to do? What are its functions in our kind of industrial society?

If the principal aim of organized labor is to "take working conditions out of competition" and if management, by and

large, insists that variable terms of employment must be established to meet the needs of individual concerns, then no solid foundation for industrial peace exists. The very purposes of collective bargaining are a subject of controversy. Cooperative action to resolve a problem is not possible if the problem itself is variously conceived.

Whether or not differences between organized labor and management can be composed around the conference table depends first of all upon their ability to see "eye to eye" about some very broad and fundamental policies. Collective bargaining has too long been thought of as a means for handling problems opportunistically without any general policies and without a philosophical base. A review of some of the policy questions that persist raises strong doubts about the soundness of looking upon collective bargaining too much as a pragmatic relationship. Conceptual differences between organized labor and management are a major cause of collective-bargaining failures.

Standard Working Conditions

One of the principal reasons behind the organization of unions is to make possible the establishment of standard terms of employment within a concern and between competing concerns. Compelling reference is not given to the ability of a particular concern to operate profitably in deciding upon the standard conditions.⁴ To the unions, and to employers who have accepted these principles, standard working conditions are looked upon as a means of stabilizing an industry. Other employers look upon this objective as an anti-social attempt by unions to gain monopolistic control. There is a wide gap between these two points-of-view.

A demand by employees for security and stability in their terms of employment, even at the possible cost of some diminution in the rate of industrial progress, has been a power-

⁴ As will be noted presently, ability to pay is not excluded as a criterion; it is not the compelling criterion when standard terms are established.

ful force in the United States for more than a decade. In response to it, collective bargaining was adopted as an approved instrumentality for introducing stability, or inflexibilities, into the terms of employment, especially in the wage-rate structures.

The collective-bargaining concept adhered to by unions was accepted, in the first instance, by the legislators when they passed the Wagner Act. Then, in the Taft-Hartley Act, the definition of collective bargaining was modified to conform more nearly to the "official" management view. It was widely believed in 1947 that unions should not have the power to "impose" standard working conditions over wide areas. Past and current struggles over the "legitimate" purposes of collective bargaining are very much at the heart of the industrial-relations conflict.

In discerning the "causes of industrial peace,"⁵ reconciliation of differences over the fundamental purposes and objectives of collective bargaining will be high on the list. There is ample evidence to support the view that these differences are reconcilable. Management understanding of labor's aims often reveals mutual benefits that can come from a stabilizing policy. At the same time, no union can long afford to be unconcerned about the cost consequences of its labor policies or about the relative competitive positions of business enterprises. They affect the economic security of its members. There is a strong mutuality of interest in both the union's demand for stability of working standards and management's demand that it be kept in a competitive position.

Any stabilization of working conditions will bear more heavily upon relatively high-cost concerns than upon their more efficient competitors. One of the fundamental purposes of traditional collective bargaining is to prevent the

⁵ An apt phrase suggested by Clinton S. Golden and used as the key-note for a series of studies inaugurated under his direction by the National Planning Association in 1947.

payment of less than the standard wage by high-cost concerns in order to underwrite profits.⁶ Wages are not looked upon as a residual share. Wages below standard are not conceived as a proper offset to management inefficiency. The cost of doing so would include an undermining of labor standards and the intensification of "unfair" competition in the sale of goods. Competition based upon management efficiency can, at least theoretically, be intensified by the establishment of proper standard working conditions.

Agreement on these "principles" of collective bargaining is most commonly found in the "highly competitive industries." There the mutuality of interest in stabilizing working conditions is easily recognized. The issue in those industries is over the kind of stabilization program to be instituted—not over whether there shall be one. These two problems are of an entirely different character. They are frequently badly confused.

In working out a stabilization program, the common interests of organized labor and of management are sometimes found to be greater than their differences. Problems of both parties can be minimized through a joint stabilization venture. The kind of venture that is undertaken is the key to whether results are salutary or disastrous. Application of stabilized working conditions affects job security, total opportunities for employment, and the use of productive resources. Under rigorous and inflexible programs, the jobs of many employees could be placed in jeopardy. Plants can be forced out of business when demands for goods are not insatiable. Lost jobs may be abstractly conceived as a reasonable price to pay for the protection of the standards at which a great majority of employees work. But the price cannot be "jacked up" too high. No good purpose of the employees is served by having high rates at which most of

⁶It is often suggested that this policy makes it difficult for the smaller concern to keep in business or for a new business to get started. Opposition to the stabilizing objective of unions, however, has been most violently expressed by the giant corporations of American industry.

them don't work. And some employees may pay a heavy price if they work at the sacrificial jobs.⁷

Establishment of stabilized working conditions through collective bargaining should be related to the problem we face of combining reasonably full employment with maximum production under a competitive economy. Rigidities in wage-rate structures will make unlikely any rapid downward spiral of labor standards. On the other hand, stabilized conditions of employment can, if they are unduly inflexible and at a relatively high level, be a major determinant of the number of companies and the number of jobs that will be placed in jeopardy when competition in the sale of goods is resumed. Strenuous protection of very high standards for some can impose a heavy burden upon others in the industry—employers and employees alike. Both the benefits and the costs of stabilized conditions of employment are shared by management, employees, and the consumer. Representatives of all three have a tremendous stake in minimizing the costs.⁸

⁷Employees who work in high-cost concerns understandably object strenuously, at times when other jobs are scarce, to sacrificing their jobs in order to protect working standards for the group of employees as a whole. In the '30's, for example, many a local union seceded from its national union and agreed to terms of employment that would maintain their jobs irrespective of any depressing consequences on the general standards. In order to apply reasonable standards without the loss of jobs, some unions have developed a keen interest in plans for the improvement of the productive efficiency of high-cost concerns. It is of more than passing interest, however, to note that most of the "celebrated" cases of so-called "union-management cooperation" for more efficient production were not inaugurated until a survival crisis was at hand. Stabilizing conditions of employment can often be soundly introduced only by a carefully thought out program of union-management cooperation to limit the costs of stabilization.

⁸Since 1941, relative production costs and comparative prices have had but a very limited bearing upon whether or not a plant could be operated. An insatiable demand for goods to fight the war and for reconversion, backed up by an unprecedented volume of purchasing power, substantially eliminated marginal considerations from business operations. Every resource was mobilized for production irrespective of the cost of its use. Wage-setting required little attention to competitive relationships because competition was suspended. Where high standard wages or wage increases could be paid by least efficient producers, and passed on to the consumers, profits were certain to be high for the industry as a whole. These circumstances are bound to change materially.

Such great risks and difficulties are encountered in fixing multi-employer standards,⁹ even when applied on a local basis, as to encourage the hope in some quarters that the whole dilemma might be side-stepped by limiting collective bargaining to plant-by-plant dealings. It is thereby concluded, however, that any stabilization of working conditions through collective bargaining is unattainable. Sidestepping the question in that manner only provokes another one. Should standards be fixed by legislation in order to avoid future downward wage spirals and "unfair competition"?

A chance that the whole subject might be referred to government regulation should not be taken without evaluating the experience gained in those industries where stabilization has been most successfully accomplished through collective bargaining. It is timely, moreover, to focus attention upon those factors that must be taken into account in formulating any stabilization program if the necessities of labor, management and the consumer are to be given adequate attention.

One way of taking working conditions of employees "out of competition," with proper regard for full employment and maximum production necessities, is to fix inflexible standards for rigid application at a relatively low level or as a minimum. Otherwise, too many concerns and too many jobs would be placed in jeopardy. Probably a more practical policy is to fix a higher standard and allow, in accordance with a general policy, for deviation upward or downward from the standard in particular cases. The higher the "ante," the more urgent is provision for flexibility in deviating from the standard. That is the only way to avoid excessive unemployment and production losses.¹⁰

* Not only to employees and to management, but to the consumer as well. Depending upon the nature of the demand, increasing costs may be "passed along to the consumer" and supplies of goods available to the consumer may be restricted.

¹⁰ The need for flexibility would also seem to depend upon the dispersion of the relative costs of production of competing plants above and below the

By and large, policy considerations of the type just discussed have yet to be grappled with in collective bargaining. Yet, it cannot be assumed, either by organized labor or by management, that the objective of stabilizing standards is soundly attained by introducing inflexible conditions of employment and at successively higher levels as new contracts are consummated. A balancing of stabilizing standards with provisions for flexibility is the problem before negotiators. Stabilizing wages and other conditions of employment through collective bargaining, with due regard for the necessities of a competitive economy, is one of the most perplexing and pressing problems of industrial relations. Coping with this problem is one of the main tasks that has to be undertaken by organized labor and by management if collective bargaining is to be strengthened.

Scope of Collective Bargaining

A rule of reason, and not arbitrament by either economic force or political power, is what it takes to reconcile adequately employer and union positions respecting the stabilization functions of collective bargaining. The same observation can be made about the conflict of views over the scope of collective bargaining, i.e., the subjects of mutual interest that should be encompassed by the joint relationship.

Collective bargaining is sometimes conceived by management as a mechanism to contain the influence of the union

average cost. Where slight variations in costs exist between competing plants, a greater latitude in fixing the standards is possessed and also a greater possibility of passing higher costs on to the consumer. In such cases, consumer risks are heaviest. The need for a flexible stabilization policy is greatest where a wide range of relative costs prevails between plants and where, in consequence, the consumer holds a stronger hand. As more producing units are encompassed by a stabilization program, the range of costs between them is likely to be greater and the development of a stabilization program more complex. It is significant, in this connection, that multi-employer bargaining on a local basis ordinarily presents less troublesome problems for labor and management, but a greater problem for the consumer, than when industry-wide bargaining on a broader basis is undertaken.

within rigidly limited areas. Some union representatives appear to look upon collective bargaining as a means for gradually extending their power to direct plant operations or their right to participate in the managerial function. Under either circumstance, the labor agreement is in the nature of a list of "concessions" reluctantly made by management under pressure. Management's pool of prerogatives is narrowed with each concession "granted." Both parties consider the stake to be the relative degree of control each will exercise over industrial operations. This approach fundamentally denies the reconcilability of the interests involved. It is not "genuine" collective bargaining at all.

Aggression and defense are implicit in the concept of collective bargaining as a struggle to retain and to gain the power of direction over industrial relations. The bargaining table is a battleground and not a place where joint problems are solved. The labor agreement is a temporary armistice rather than a treaty for peace and cooperation. Wherever these concepts prevail, no basis for sustained industrial peace obtains. If those concepts are, in fact, widely held by negotiators, then the government's role as an adjuster of relative power will not only continue but will surely become steadily more important as successive crises are dealt with.

Divergent policies of labor unions and of management relative to the scope of collective bargaining are responsible in no small measure for the kind of joint relations just described. Many unions have not been ready to admit that a significant broadening of the scope of collective bargaining can most satisfactorily come about only by agreement. It cannot be soundly won by a strike. Wherever management holds the conviction, rightly or wrongly, that its continued security depends upon the exclusion of a particular subject from the joint relationship, that dispute is not finally resolved by a strike over it that the union might win.¹¹

¹¹ This dispute is not "settled" by a strike any more than a union will willingly give up its drive for recognition when it loses an organization strike. A basic security issue can be resolved only by mutual agreement.

Various subjects are clothed, in different situations, with "management security" implications. They are not only the less debatable items of plant location, production scheduling and the like. In some cases, for example, setting time or production standards is held to be an exclusive function of management. A company may be compelled by economic force to recognize temporarily such matters as being in the "mutual interest" category. It may be forced to incorporate terms in the agreement that it believes threaten management security. The "agreement" may then do little more than condition the nature of the continuing struggle over that issue.¹²

Labor gains in increasing the scope of collective bargaining can most soundly derive from voluntary agreement. In other words, some "demands" have to be earned by the developing of management confidence in and respect for the union rather than through work-stoppages. Economic force is a special-purpose and not a general-purpose weapon. Perhaps this explains why the union's department of state has become much more important than its department of war in those industries where notable examples of good collective bargaining are to be found.

An arm's length relationship may be fashioned by a union's failure to perceive that economic force is not a practical device for attaining all its objectives. A widely prevalent management point-of-view about the scope of collective bargaining similarly contributes to noncooperative joint dealing. Reference is made to the idea that a list of specified subjects can be permanently fenced off from the collective bargaining relationship. Especially since the "out-of-bounds" subjects are usually suggested for uniform

¹² Some of the difficulty over the scope question arises from a management disposition to claim that inclusion of any new subject in the agreement threatens its basic security. This was the cry raised years ago, for example, when unions sought to make disciplinary actions of management subject to review. Because of this history, it is not possible to expect unions to eschew strike action wherever management raises the security issue.

application to all plants and to all industries, the "containing" purposes of such a proposal are starkly emphasized. These purposes are at odds with the fact that new subjects have to be introduced into collective bargaining when problems of mutual interest concerning them are precipitated by events.

Any general specification of the scope of collective bargaining would also ignore the fact that the exact subjects dealt with in joint dealing do vary widely between plants and between industries. In most situations, for instance, hiring practices of employers are not even talked about in negotiations. In others, they comprise a major topic of joint dealing. Whether or not a subject of this nature is a matter of joint concern depends upon the problems of the industry and the reactions of the parties themselves. No decision about what constitutes a matter of mutual concern can possibly be made beforehand by some general rule or by legislation.

Attempts to settle adequately issues about the "proper" scope of the labor agreement are likely to fail unless labor unions recognize the limited usefulness of strike action in this area and unless management understands the artificiality of efforts permanently to fence out specified subjects.

Issues over the scope of collective bargaining constitute the management-security counterpart of the union-security issue. If joint dealing cannot be developed as a cooperative undertaking, concerned with changing subjects of mutual interest, then the fundamental idea underlying collective bargaining is erroneous. A number of the basic principles of collective bargaining evidently need a careful re-examination as a part of any program to build up industrial self-government.

Employee Responsibility

The union-security issue also has to be thought through along new lines. That issue might be much more readily

dealt with in the future by a reorientation of thought. An evaluation should be made of individual employee responsibility and obligation to the labor agreement and as respects the creation of a sound collective-bargaining system.

The propriety of requiring employers to give up certain of their rights, and of placing certain obligations upon them, in order to bring about stabilized industrial relations has long been recognized. Union officials, too, have been given obligations to go along with their rights. Careful attention has yet to be directed, however, to the obligations that devolve upon all employees when a majority of them, in an appropriate unit, decide to be represented by a union. What needs to be reasoned through is the extent to which employees and minority groups should be called upon to forego individual rights so that a stable bargaining relationship may be built up.

Protection of the rights of individual employees and of minority groups is, of course, an extremely important undertaking. Any defense of those rights, without any regard for the necessities of collective bargaining, quickly raises the question of whether or not individual bargaining should be adopted and supported as the approved method for setting the terms of employment. This real nature of the issue should be faced in a forthright manner. If collective bargaining is to be practiced at all there will have to be some collective control by unions over jobs and job opportunities.¹³ How much control is the nub of this question.

One aspect of this problem has been clarified. Control of jobs is not considered by the public as an inherent right that automatically accrues to any union irrespective of the use to which the power of the labor organization is directed. A union is not a "job empire." On the contrary, the public has

¹³ Even the Taft-Hartley Act recognizes that a majority of those in an appropriate unit may vote for a union shop and thereby impose an obligation upon all employees to join a union, including those who would prefer not to join.

unmistakably decided that unions should earn the right to control jobs by gaining the confidence of employees as well as the consent of employers.

Once a labor agreement is signed, however, all employees in a unit have an obligation to live up to it. All of them receive its benefits. Union members, who initiated collective bargaining by giving the union a legal right to act as their agent, have a peculiar responsibility to see that the commitments made on their behalf are carried out. By exercising their right to collective bargaining, these employees imposed some onerous legal obligations upon their employer and gave status to their union. It is altogether proper to conceive that duties should devolve upon union members in order that the chain of circumstances started by them may have constructive results. No discussion of employee collective-bargaining rights is complete without attention being given at the same time to employee collective-bargaining obligations. That attention centers around the union-security issue.

A formidable dilemma was created when the country adopted collective bargaining as the approved method for setting the conditions of employment. Mobilizing the strength of employees as a group by its very nature entailed the loss by individual employees of some of their rights. A collective control over jobs and over job opportunity by the labor organization, was a prerequisite to collective bargaining. Stable collective bargaining connotes, in addition, a long-term industrial relationship and not a succession of dual union movements or constantly changing representation arrangements. The theory and the realities of joint dealing need to be taken into account when individual employee rights are defended. The entire union-security question thus needs a careful reappraisal in order to preserve individual employee rights to the fullest possible extent, but also to determine what employee responsibilities are a necessary concomitant of a stable collective-bargaining system.

Functions of Strikes and Lockouts

So much attention has been given to the right to strike that the functions of the strike have tended to be overlooked. Two aspects of strike and lockout usage need highlighting as a part of an endeavor to get collective bargaining back on the track. In the first place, the rights of strike and of lockout are most valuable when they are not exercised at all. Only as they serve to induce peaceful and equitable settlements do they possess great value. Secondly, there are situations in which economic force simply cannot be used to perform the regular strike function of bringing the other party to terms. These are the cases where a strike exerts primary pressure upon the government to intervene and to supplant collective bargaining.

The power to stop production, which management and unions both possess, primarily gives a final and a cogent argument for compromise and agreement around the bargaining table. Economic power is not an adequate substitute for intelligence. Strike and lockout powers are abused when their possession is interpreted as a license to ignore cooperative approaches to the problems of industrial relations. The old "wheeze" about the "lion's share to the lion" has a fatal defect. Getting less than "the traffic will bear," both on the upswing and on the downswing, is often the best way to insure against work-stoppages and to stabilize industrial relations in the interests of all parties. It is also often the best way to protect against government intervention.

It is time for a general recognition of the fact that, under certain conditions, work-stoppages are quite obsolete methods of collective bargaining. They can't perform any collective bargaining function, for example, when they bring on a national emergency or public distress. Since the disputants can normally hold out longer than the government, national emergency strikes have no constructive function to perform. By forcing government intervention, such strikes actually

undermine the very fundamentals of collective bargaining.

Restraint in the use of strikes and lockouts involves not merely a "big-hearted" assumption of social responsibility by labor and management. If these parties would keep their affairs in their own hands, restraint is a matter of selfish interest. These aspects of collective bargaining also need careful evaluation by labor and by management.

Functions of the Grievance Procedure

Outstanding progress has been made in building up the grievance-handling phases of collective bargaining. Utilization of the full potentialities of the grievance procedure waits, however, upon a more thorough analysis and understanding of its functions by labor and by management. The real meaning of many agreement terms derives, as previously mentioned,¹⁴ from the way grievances about them are settled. Foremen and shop stewards consequently have fundamental collective-bargaining responsibilities.

Only by removing decisions about grievances from the work place, and on up to higher levels of authority, can foremen and stewards be given a minor bargaining role. This is neither feasible nor practical. As long as collective bargaining is looked upon as a human relationship, grievances will be handled promptly and by those who understand them. Training of foremen and shop stewards in the fundamentals of collective bargaining and in the nature of the labor agreement is a highly essential aspect of developing good relations.

A full appreciation of the potentialities for good relations that lie in grievance-settling policies would, in all likelihood, also clear up many of the confused ideas which prevail about how compliance with agreement terms should be achieved. Those ideas have come to doubtful fruition in a number of provisions of the Taft-Hartley Act. Disposing of an employee claim that management has violated a labor contract

¹⁴ See pages 296 to 301.

frequently involves more agreement-making than agreement-interpreting. Substance and definitiveness are given to the general agreement terms only as those terms are amplified through settlement of grievances. Here is no simple "compliance" problem.

Employers may also "grieve" when they believe a union, or the employees, have violated a term of the contract. In the process of settling an employer grievance, substance and meaning is also given to that agreement term. Consider the contract clause, of greatest importance in this connection, in which the union commits its members not to strike or to interfere with production during the life of an agreement. The "no-strike" clause of a labor contract needs development in day-to-day collective bargaining in exactly the same way as management's commitment, for example, that employees will not be disciplined except "for cause."

Alleged violations of an agreement term by either the union or management calls for day-by-day collective bargaining and, if necessary, submission to arbitration at the final step of a grievance procedure provided in the agreement. Then, the no-strike clause can be unqualified, even under the Taft-Hartley Act.¹⁵ An examination of the various concepts underlying the grievance procedure is one of the big steps that organized labor and management might take in furtherance of more effective collective bargaining.

Summary

A determination to build up the agreement-making potentialities of collective bargaining requires not only good intentions but an ability and a willingness to grapple with some very difficult policy problems. Some of those problems—among the most important—have just been briefly

¹⁵ If either party is unwilling to submit the interpretation or application of a certain clause of the agreement to arbitration, provision may either be made for a resort to economic force to resolve an issue during the term of the agreement or for acceptance of management's interpretation of the clause.

referred to. They suffice to illustrate the kind of basic concepts about collective bargaining that need careful evaluation as a part of the task of straightening out our industrial relations.

Settlements of labor disputes around the conference table will never be fully effective so long as wide differences persist about the very purpose of collective bargaining and over the precise nature of many issues that have to be reconciled. A concise definition of collective bargaining is highly elusive. But, the basic concepts of collective bargaining can be worked out and agreed to. Getting those basic concepts cleared up is one of the jobs that should be undertaken by those in labor and industry who are desirous of making collective bargaining work.

TECHNIQUES OF COLLECTIVE BARGAINING

Certain methods and practices of labor negotiation lead inexorably to a widening of differences and often to an ultimate impasse. Other methods and practices narrow the differences and help bring about a final meeting of minds. In recognition of these facts, various provisions of the Taft-Hartley Act were conceived on the assumption that the government could specify and require the use of procedures that facilitate agreement-making.

Whether or not any salutary results will be achieved by government regulation of collective-bargaining procedures will be a debatable subject until answers are evolved through experience. Whatever the answers are, procedures developed by the parties themselves will do a better job. Agreed-upon procedures are needed, moreover, to supplement those required by the government. Promulgation of procedural rules by organized labor and management can give what government-imposed regulations can never provide—a will to agree. When the parties devise their own procedures, as during World War II,¹⁸ they have a stake in seeing to it that

¹⁸ See Chapter IV.

the rules work. As will be presently noted, moreover, the parties can develop various kinds of procedures that the government cannot. All these factors call out for organized labor and management to take the lead in developing better techniques for their own joint dealings.

Labor-Management Conferences

During each of the two World Wars that have so far blasted the 20th century, an emergency national labor policy was based upon a labor-management agreement. At the very beginning of each emergency, a basic charter to govern industrial relations was evolved out of the deliberations of a Labor-Management Conference. Each agreement was incomparably effective. Rights were voluntarily relinquished and obligations voluntarily assumed. Outstanding representatives of the employees and of industry voluntarily took on the task of seeing to it that their understanding worked.

After victory in each war, the government was willing and anxious to continue a national policy grounded upon a voluntary agreement between labor and industry. Conferences were called, under government auspices, and each time the public fervently hoped for a voluntarily promulgated Charter of Industrial Relations. If labor and management could agree upon their mutual rights and obligations—if they could work out their own mechanisms for resolving their differences peacefully—then industrial warfare could be best controlled. A peace treaty between organized labor and management, based upon a mutual recognition of rights and obligations, was sought at the end of World War I and of World War II.

In each instance, complete failure marked the efforts of labor and management to minimize effectively the forces behind industrial-relations conflict. Government policy was subsequently forced in the direction of adjusting the balance of power held by the conflicting parties. After World War I and its great depression, the government weight was

thrown heavily behind the employees and their labor organizations in order to bring about an "equality of bargaining power." Following World War II, and in the midst of its inflationary aftermath, the government influence was exerted in the opposite direction in an effort to cut down organized labor's "excessive" economic power.

Steadily accumulating regulations, along with government-prescribed terms of employment, are a likely prospect if the government is to adjust the balance of power first one way and then the other with major shifts of the business cycle and of political power. A balance-of-power theory as the basis for a national labor policy leads irresistibly to the eclipse of collective bargaining.

Because of these prospects, the labor-management conference idea should not be summarily dismissed.¹⁷ There is no assurance that a worthwhile Labor-Management Charter can easily be formulated. The odds are heavily against it. But the odds might shorten with a clear perception of the differences between a balance-of-power labor policy and one based upon voluntary agreement of organized labor and management representatives.

Much-needed support to collective bargaining could be given by a basic charter of industrial-relations rights and obligations. An agenda for a labor-management conference to deal with fundamental problems would certainly include consideration of a charter. It should be much more comprehensive. Basic policy and procedural agreements for the effectuation of collective bargaining could also be consummated. Guides would thereby be made available to the negotiators of individual labor agreements. Procedural and policy suggestions recommended by the ranking leaders of labor and of industry would have a status comparable to that accorded to regulations hammered out through the "voluntarism" of World War II.

¹⁷ It should not be dismissed any more than the idea of a United Nations should be scrapped because of the failures that have so far marked the search of the countries of the world for a cooperation in peace comparable to that which prevailed in war.

Understandings reached at the Labor-Management Conference of 1945 failed to provide a basic charter. They constitute, nonetheless, an auspicious start in the promulgation of a "code of fair labor practices" for the guidance of negotiators.¹⁸ At the 1945 conference, the delegates unanimously agreed, for example, that every grievance procedure should have a terminal point at which grievances are to be finally settled by an arbitrator, impartial chairman, or impartial umpire. A certain technique for peaceful industrial relations was evaluated and recommended for widespread adoption. General agreements of this type could be a powerful impetus to a better functioning of collective bargaining.

Any suggestion that labor-management conferences¹⁹ have an important function to perform in collective bargaining is sure to be dismissed by some as "idealistic." Obstacles to progress in this direction are truly formidable. Splits in the labor movement, with a resultant jockeying for position and influence, make general policy agreements unlikely even within the ranks of labor. Divergent views about what are sound policies also prevail within management circles. Compromise and agreement is the collective bargaining way of ironing out even these difficulties. Rejection of the labor-management conference idea carries with it a disavowal of the basic collective-bargaining principle that industrial-relations conflicts are reconcilable around the conference table.

Negotiating Procedure

Marshaling all known resources to make collective bargaining work better calls for a sustained development, by organized labor and management, of negotiating procedures that facilitate agreement-making. Methods approved by

¹⁸ The quoted phrase, and the idea behind it, was originally suggested by Mr. Lloyd K. Garrison. This seems to be a particularly helpful phrase because of the emphasis it places upon the need for positive steps to effectuate collective bargaining.

¹⁹ They could be held nationally, locally, or on an industry basis with a view to arriving at general policy agreements designed to facilitate joint dealings over the problems typical of each area of discussion.

the parties would doubtless be of an altogether different character than government regulations promulgated for the same purpose. Procedures devised by the parties would have a far greater potentiality for constructive results.

Negotiations carried on with a determination to use all reasonable means to arrive peacefully at a meeting of minds might well be conceived as a three-step process. "Standard" steps in working out the terms of an agreement should include (a) prenegotiation conferences, (b) negotiation proper, and (c) an appraisal of the applicability of mediation and voluntary arbitration in settling unresolved issues.

In each of these steps, established and tested techniques for facilitating agreement-making should be fully utilized. Full use of these steps and utilization of the sound practices that each of them will contribute, as no regulatory law can, would lead to more agreements and to fewer work-stop-pages.

A. Prenegotiation Conferences

Meetings between union and management representatives to negotiate contract terms are often preceded by a public announcement of extreme positions that have been taken without regard for the problems faced by the other party. The gap to be bridged in negotiations is made as formidable as possible right from the start.

Differences become even wider and are made less negotiable when the fanfare departments get to work. Negotiators are frequently forced "out on a limb," long before they face up to the real issues which have to be solved. As if the actual problems weren't bad enough, artificial ones are created. Charges and counter-charges about the good faith of "the other party," for example, are frequently added to the confusion. Even with full realization of the "political necessities" of union negotiators, such "preparation" for negotiations is poor workmanship.

"Smart tactics" of the kind under discussion have brought about many an impasse and many a strike. Inept preparations for negotiation can easily dissipate the agreement-making possibilities of collective bargaining. It is fully within the power of organized labor and management, and in their self-interest as well, to improve this situation.

At a recent conference, attended by more than a hundred local union officials, one point-of-view received virtually unanimous acceptance. It was that sound industrial relations were not likely to obtain as long as negotiations "teed off" with a discussion of extreme union "demands" already sold solidly to the membership without any consideration of management problems. These union representatives were also concerned about the anti-collective-bargaining aspects of taking a strike vote before negotiations start. These practices, and others like them, hinder agreement-making. They tend to prevent union negotiators from being able to make the "concessions" that finally bring about a meeting of minds. Mention might also have been made by those at the labor conference of similar restrictions placed upon company negotiators by "upstairs" policies arrived at without a full appreciation of the bargaining process or of the problems up for solution.

Tactics of negotiation have widely tended to restrict the possibilities of arriving at an agreement. They are too frequently conflict tactics, whether deliberately so conceived or inadvertently followed. Preliminary moves seem frequently to be made right from the start as a mobilization of strength to stop production. As extreme positions are assumed and reiterated, and as face-saving factors loom ever greater, negotiations sometimes head like a Greek tragedy toward disaster. It is frequently observed, even before negotiators get under way, that "it will take a work-stoppage to clear the atmosphere." Organized labor and management ought to be able to conduct their relations at least to avoid stoppages of production for face-saving reasons.

Another kind of strike would seem to be avoidable. That is the stoppage that takes place because of a "disagreement" about certain facts. Breakdowns in negotiations have been precipitated in particular cases, for example, because of opposing contentions about what wages the employees actually receive or what profits have been earned by the company. One of the ways to improve negotiations is to start out with the pertinent facts previously agreed to. In this connection, a keen observer has suggested that "men can't disagree about a fact; they can only be ignorant of it."²⁰

There is a pressing need for organized labor and management to incorporate the prenegotiation conference in their joint dealings. Such conferences should be held before "demands" are formulated and long before a crisis occurs.²¹ Joint discussion of the problems faced by both parties and a "going over" of the economic facts that affect both parties should be looked upon as an essential preparation for the formulation of demands.²²

If understanding is to supplant tactical maneuvers in the conduct of negotiations, the precollective-bargaining conference will be given a place of great prominence. Amicable understandings about the terms of a new agreement are not assured by this technique. But its use can narrow the range of differences that have to be bridged. Work-stoppages un-

²⁰ The phrase was coined by William H. Davis during the hectic days of the National War Labor Board of World War II.

²¹ Presentation of demands sixty days in advance of their requested effective date, as required by the Taft-Hartley Act, eliminates the "surprise" demand made on the eve of contract expiration. As previously noted (see page 286), this regulation could nevertheless result in the parties being farther apart than ever when negotiations actually begin.

²² An outstanding example of the use of the prenegotiation conference may be cited. Under the National Agreement between the Federation of Hosiery Workers and the Full-Fashioned Hosiery Manufacturers of America, Inc., the Impartial Chairman makes a "joint wage survey" for the guidance of the parties in taking initial negotiating positions. In this piecework industry, differences over the facts about hourly earnings could deter the agreement-making process. Such differences are avoided by starting the negotiations with agreed-upon facts about the earnings of the employees. In addition, preliminary discussions about the "state of the industry" constitute a "standard" procedure.

dertaken to get somebody "back off the limb" or because of a failure to secure the facts can be minimized. The pre-negotiation conference is not spectacular but, by developing its use, labor and management could act constructively to improve the processes of collective bargaining.

B. *Negotiations Proper*

Great differences of opinion exist about the ways of conducting negotiations so as to make consummation of an agreement the end result. No universally applicable procedural pattern for negotiations can be pointed out as the one best way. Varied approaches will always be used, depending upon the problem to be dealt with, the nature of the relationship, and the personalities of the negotiators.

Strong support exists in some industries for the participation in negotiations of but several representatives from each side. In most cases, the small conference produces the best results. There are instances, however, where dealings have been notably improved by the introduction of so-called "goldfish bowl" negotiations. Attendance of a large number of union and company representatives results in a wide dissemination of information about the factors that were weighed in arriving at a final settlement. The two methods have also been combined. A large attendance at formal negotiations can be supplemented by small "side-line" conferences where the range of differences between the union and the company is actually narrowed.

In many other respects, choices can be made as between alternative methods of negotiation. For example, discussion may be started off with the "easy items" so that a habit of agreement will be encouraged. Some negotiators prefer, however, to begin with the most critical issue. Unless this key to the whole negotiation is first disposed of, they believe, no real "give and take" will occur over the less important issues. As just one more illustration, *ad seriatum* and "basket" bargaining of the various so-called money issues has

each its proponents. In the one case, issues will be taken up on their merits one at a time. In the "basket" approach, an over-all increase in labor cost will first be bargained out and the total then allocated, as far as it will go, to dispose of all money issues.

Altogether too little attention has been given to the advantages of a deliberate selection of those methods of negotiation that are peculiarly adapted to the needs of a particular situation. Procedural questions of negotiation are actually of sufficient importance to warrant special consideration. Negotiating methods will otherwise "just grow"—not infrequently in directions that obstruct agreement-making. Results may be even worse. Negotiators for each side occasionally insist so persistently upon following different methods of bargaining that discussions of the real issues never get satisfactorily under way. One cause of collective-bargaining failure is an inability to arrive at a meeting of minds about how negotiations should be conducted.

Improvements in negotiating methods are not likely to be achieved by an application of standard rules. Awareness of the advantages and of the disadvantages that lie in various approaches, and a knowledge of the situations to which each is adapted, could greatly assist negotiators in directing their dealings toward ultimate agreement. Positive results in collective bargaining will be more certain if the parties intelligently choose those procedures that narrow differences and avoid those that widen the gap between them.

C. Applicability of Mediation and Voluntary Arbitration

Despite the use of prenegotiation conferences, and even though negotiations are conducted in the best conceivable manner, differences may not be resolved. A changed point-of-view toward the negotiations is then called for. The parties should then concentrate their efforts upon an appraisal of whether mediation or voluntary arbitration is adapted to their needs. They should decide, in other words,

if "outside" assistance would be helpful in resolving their differences without a work-stoppage.

The kind of mediation contemplated in this discussion comprises that kind of third-party participation through which terms of settlement may be proposed by a "third party." There are cases, for example, in which an impasse in negotiations was broken by a mediator's recounting of the manner in which a similar problem was successfully met elsewhere. Or the parties may desire some "outside" evaluation of their positions before deciding to hold fast to them even at the risk of going through a work-stoppage. Whether or not a "last offer" seems reasonable to an impartial observer might have an important bearing upon the wisdom of going through with a strike in order to avoid further concessions. In addition, there are occasions when a "fresh viewpoint" can clear the atmosphere for negotiators who have lived too long with a deadlock.

Looking over the various possibilities of using voluntary mediation, to determine whether or not an outside agency should be brought into the picture, often brings about a direct settlement. New appraisals of the contesting positions are made by the negotiators. New concessions sufficient to bridge the gap may be forthcoming. If it is decided to bring in outside assistance, under voluntary mediation, organized labor and management can select such services as will be most helpful to them. A single mediator familiar with an industry, a three-man board of mediation variously composed, or a fact-finding board,²³ each has peculiar values. One or the other might possess marked advantages in giving the parties the assistance that will help most in resolving their differences. Voluntary mediation has advantages that are not apt to be found in compulsory mediation under government auspices.

²³ The fact-finding board can most logically be considered as a form of mediation whether it merely assembles facts or, in addition, formally makes a recommendation. In either case, the purpose is to remove obstacles in the way of a meeting of the minds of the parties.

Furthering the use of voluntary mediation, as an adjunct to collective bargaining, is a course that can often be most appropriately pursued on an industry or a regional basis.²⁴ Calling in someone who is familiar with the economics of an industry is logical. So is it logical to call upon persons who are familiar with the local business and labor situation. These considerations have impelled local union and business leaders in a number of important communities to set up their own mediation machinery.²⁵ Intensification of such efforts, along with development of a better understanding of the varied uses of mediation, rank high among those steps which can be taken by organized labor and industry to develop industrial self-government.

A number of undeveloped resources of great potential value are waiting to be used for the improvement of collective bargaining over the terms of a future labor agreement. One other resource, voluntary arbitration, has yet to be carefully evaluated and judiciously used by organized labor and industry. Negotiators who are unable to arrive directly at an agreement may still be able to agree that their differences should be submitted to arbitration. Despite all its imperfections, arbitration may be preferable to the use of another imperfect method—the stoppage of production. The question before the parties is not whether arbitration is *per se* desirable. Arbitration is probably never as satisfactory as an agreement. But if agreement cannot be arrived at, the parties have to decide whether the risks of voluntary arbitration are less than the costs of a strike. Some regard also has to be given to the terms of employment that would likely result through the arbitrament of a strike.

²⁴ Except for national disputes that run over many areas. For these disputes, only a national mediation board can be effective.

²⁵ The mediation plan in Toledo, Ohio, is an outstanding example. Local programs for voluntary mediation have also been set up in a number of other cities, including Boston and Philadelphia. Other "local" services are utilized for mediation. The individual who serves in an industry as a permanent Impartial Chairman may be called upon to act as a mediator in the bargaining over a new agreement.

The decision to be made by negotiators about the possible use of arbitration is not an easy one. Submission to arbitration of issues vitally affecting union security or management security may make "life or death" matters dependent upon the unpredictable judgment of an outsider. These vital issues will ordinarily not be arbitrated if the choice lies with the parties. Such critical issues do not account for anything like a large majority of the breakdowns in negotiations. Why then is voluntary arbitration so infrequently selected over a work-stoppage as a means of arriving at the terms of labor agreements?

A notable lack of confidence in arbitration as a means of fixing the terms of future agreements exists rather generally throughout the ranks of organized labor and of management. The distrust often stems from some harsh experiences. The many deficiencies of voluntary arbitration, as practiced in the past, serve principally to show the magnitude of the task that has to be tackled if voluntary arbitration is to be built up into an effective mechanism. That task can be avoided only with the likely result of encouraging an even greater public demand for compulsory arbitration than has yet emerged.²⁶ Better voluntary arbitration or more compulsory arbitration may constitute the choice before labor and management, especially where work stoppages create a public emergency. Creation of more effective voluntary arbitration methods and techniques is thus among the most important of all challenges in the field of industrial relations.

Programs are under way, by those who work directly in arbitration, to deal with procedural problems faced by arbitrators and possibly to develop a "code of ethics" for the

²⁶ Especially urgent is the need for building up voluntary arbitration for use in situations where an actual strike or lockout will adversely affect public safety and health. In such cases, a stoppage cannot be permitted to run its course. The government is then called upon directly to specify the terms of employment or a method for arriving at them.

conduct of voluntary arbitration proceedings.²⁷ The vital aspects of effectuating voluntary arbitration, however, can only be satisfactorily undertaken directly by organized labor and management. These parties have already mapped out the way to make voluntary arbitration more useful. Out of the Labor-Management Conference of 1945 came the agreement, previously referred to,²⁸ that "If direct negotiations and conciliation have not been successful, voluntary arbitration may be considered by the parties. However, before voluntary arbitration is agreed upon as a means of settling unsettled issues, the parties themselves should agree on the precise issues, the terms of submission, and the principles or factors by which the arbitrator shall be governed."

Attention was strongly directed to the stipulation to arbitrate by the understanding just quoted. That largely forgotten document of industrial relations is the key to an improved voluntary arbitration. If the parties can agree upon the criteria to be followed by an arbitrator in arriving at his decision, then the risks of voluntary arbitration can be materially minimized for both parties. And criteria for arbitration can be acceptably devised only by the parties themselves. What value can be gained by criteria for the guidance of arbitrators that the parties won't accept?

In pointing out the importance of the agreement to arbitrate, the Labor-Management Conference charted the course—a hard and a challenging way—through which voluntary arbitration might become more widely used. In essence, the recommendation of the Labor-Management Conference is that arbitration should be restricted in accordance with prior understandings reached by the parties.

Most arbitration proceedings are not so initiated or so

²⁷ The National Academy of Arbitrators was formed in December 1947 by a large number of arbitrators who were aware of the shortcomings of the arbitration technique and who hoped to do something about it. In addition, the American Arbitration Association is continuing with its plans for applying voluntary arbitration more effectively in the field of industrial relations.

²⁸ See page 226.

conducted. Unrestricted submissions have been the rule. The arbitration decision derives from the uninstructed judgment of the arbitrator. Even though that may often be preferable to the parties to arbitrament through a work-stoppage, the results have been found to be unsatisfactory. The decision is a personal one based upon the arbitrator's own selection of criteria.²⁹ Dissatisfaction with the award is easily generated and the occupational hazards of the arbitrator are excessive.

In order to avoid such great uncertainty about the arbitration, and to minimize the factor of personal judgment, three-man boards have been constituted very generally. The neutral member of the Board is flanked by a representative of each of the parties. A majority vote is usually necessary to validate any decision. The judgment of the third man on the Board is made subject to checks and balances by the introduction of an altogether new factor—the need to get a majority vote.

In setting up a three-man board, including a representative of each disputant, the parties select a form of arbitration that is akin to collective bargaining. Agreement between the two parties is not the only way to arrive at a settlement. An agreement between either of them and the arbitrator is just as conclusive. Since a unanimous vote of the Board is the best solution, the neutral member is a kind of mediator with an unusual status. He possesses a reserve power to cast his vote with one side or the other to arrive at a decision.³⁰

²⁹ A three-man board composed entirely of neutral or "public" members is occasionally used in order to avoid a one-man judgment. Great advantages accrue from this type of board in critical cases, and consideration might well be given to its more general use.

³⁰ If the arbitrator cannot induce either party to support his position, he faces the choice of completing the work of the Board by voting with one of the other members or of withdrawing from the Board and throwing the dispute back to the parties more unsettled than ever. The latter course is infrequently chosen. The parties presumably freely chose the risks of the form of arbitration they set up.

The major defects of either of the forms of arbitration just discussed would be substantially eliminated if parties, unable to resolve their differences directly, could agree upon certain guides for an arbitrator or an arbitration board to follow. Upon first consideration this route appears to be a dead-end street. If the parties could agree upon the factors to dictate an arbitration award, they would directly settle their dispute. This very fact makes an appraisal of the possibilities of arbitration unusually worthwhile as a formal third step in negotiations.

The issues are re-examined from a new point of view. They will usually look different when appraised, even vicariously, through the eyes of an impartial outsider. Attempts to work out a stipulation to arbitrate, along the lines mentioned, have resulted in numerous agreements over the years after all hope of working out differences had been abandoned. There are other cases, not numerous but not uncommon, where the parties have been willing to submit an issue to arbitration solely because criteria or restrictions on the arbitrator were worked out in their own negotiations.³¹ One or both parties found it feasible to recede indirectly from an extreme position by agreeing to a restricted stipulation where a direct withdrawal of a demand would not have been possible. Under these circumstances, voluntary arbitration has an unquestioned part to play in the avoidance of unnecessary stoppages.

Discussing the possibility of arbitration as a standard third step of negotiations is one way for labor and management to work for more peaceful settlements and fewer strikes. Advantages can be gained from use of voluntary arbitration even at present when altogether too little is

³¹ Applicable criteria will vary under different economic circumstances. The wage-setting problem is different, for example, when wages are 10 per cent of manufacturing costs in one case as compared to 50 per cent of costs in another. What is called for is an understanding of the circumstances under which particular criteria are applicable.

known about the criteria that should be applied, under a given set of facts, for the settlement of a controversy.

It is neither possible nor desirable to develop standard or universally applicable criteria for arbitral judgment. But it would facilitate agreement-making if negotiators were more completely aware of the various criteria that might be incorporated into a stipulation to arbitrate and if they had some basis for determining the applicability of each to their own industrial-relations problems that seem to defy solution.³² In time, the stipulation to arbitrate might no longer be the forgotten document in industrial relations. It could become a means of facilitating the peaceful settlement of labor disputes by making arbitration more usable.

Available to representatives of organized labor and of management are many opportunities to assume leadership in the creation of a more efficient collective bargaining. A great number of these opportunities concern improvement of the form and the practices of joint negotiation. A better "know-how" of collective bargaining can serve to bring about more peaceful settlement of disputes and thus contribute to making a reality of the idea of industrial self-government.

THE FUTURE COURSE OF INDUSTRIAL RELATIONS

Collective bargaining is neither a "natural" nor an instinctive way of industrial life. The primacy of reason and a will to cooperate, both so important in agreement-making, doubtless have to be classed as acquired characteristics. In addition, an assumption that the objectives of organized labor and management are reconcilable, because their common interests are more compelling than the points of dif-

³² In particular cases, for example, the parties could agree that either ability to pay, comparable wage-rates in the industry, or prevailing wage-rates in the area were the criterion for determining their dispute. Criteria for arbitration are a proper subject for negotiations and through negotiations the criteria applicable to a given case should be developed.

ference between them, is a difficult concept. Collective bargaining has to be built upon that concept. Collective bargaining assumes that organized labor and management can and will voluntarily work out their differences by understanding, compromise and agreement. Whether or not the whole philosophy is erroneous will be shown by future events.

Collective bargaining is not the only way to fix conditions of employment. There are alternate ways that, upon first glance, often seem to be more simple and more practical. The terms under which men work may be unilaterally imposed by the employer whenever he possesses a preponderance of economic power. That method has already been rejected. Its defects gave rise to the Wagner Act. Employment terms may also be arbitrarily fixed by a union whenever its economic power becomes excessive. Uses of union power in this way gave a considerable public support to the Taft-Hartley Act. Either of these two methods minimizes, and may entirely reject, a fundamental premise of collective bargaining—that the needs and the interests of both employees and employers should be taken into account when conditions of employment are determined upon.

Use of economic power by either management or organized labor to impose arbitrarily terms of employment on the other seems inevitably to be followed by an extension of government regulation over industrial relations. Balance-of-power is then deliberately redressed by government so that neither party will be able to fix employment terms unilaterally. Collective-bargaining failures have resulted in a search for industrial peace and stability primarily by resort to a national labor policy designed to maintain an equality of bargaining power. That policy will assuredly produce no more than a succession of temporary armistices and at best will provide no more than an uneasy peace. It further makes relative political power the major determinant of the relations between organized labor and management.

One other method for deciding upon conditions of employment can be utilized. The government may establish the terms of employment for both labor and management. Action can be taken either directly through legislation or by requiring some form of compulsory arbitration. Either course entails the loss of control by organized labor and by management over their arrangements for working together. Such a policy does more than restrict personal liberties and retard economic progress. To effectuate that program, governmental sanctions have to be set up to enforce acceptance of the terms of employment that are imposed. As a nation we cling tenaciously to the hope that collective bargaining will work well enough to avoid all-out recourse to government regulation. We instinctively defend the rights of strike and lockout because their restriction brings direct government fixation of the terms of employment and supporting sanctions.

Getting our industrial relations onto a sound, even keel is possible only if collective bargaining can be gotten onto the track. The efforts of organized labor, management, and the government should be concentrated upon improving and facilitating the collective-bargaining relationship before government regulation is accepted by the public as the only way out.³³ The stakes are great enough to justify a hope that such efforts will bring results.

The future course of industrial relations will not be dependent only upon ideological considerations and labor policies initiated by the government. A key factor is whether or not organized labor and management genuinely accept the basic premises of collective bargaining and then develop techniques and practices that can assist them in reconciling their differences. Very few work-stoppages evidence a de-

³³ A distinction should be drawn between required procedures that tend to assist agreement-making, such as the enforced negotiation and mediation of contract renewals, and those that give a general power of direction to the government as epitomized in the requirement that the parties bargain in good faith.

liberate use of economic force to re-allocate the power of direction over industry. Nor do most work-stoppages reflect a preference for economic force over a compromise settlement as the primary way to fix employment terms. Altogether too many work-stoppages occur because the tools and the techniques of agreement-making in the hands of negotiators are inadequate, or the skill in using them is undeveloped. Labor and management can grasp the opportunity that is theirs to work together purposefully for the improvement of collective bargaining processes.

There is no certainty at all that the ideal of industrial self-government through collective bargaining will be realized. It is virtually certain that the alternative is government regulation of industrial relations by a combination of rules affecting the balance of power and directly specifying the terms of employment. That prospect alone would seem to justify unusual efforts to create a stronger collective bargaining.

The task of making collective bargaining work embodies one of the great challenges to what we call "the democratic process." The challenge comes at a time when governmental control of the economic affairs of men is being widely adopted in many countries. Despite all the problems and the crises that have accompanied the inauguration and development of collective bargaining, its essentiality to democracy, as we conceive it, is widely and fully appreciated.

A fervent hope persists that organized labor and management will somehow "get together" and acquire the "know-how" for building up collective bargaining as a highly constructive social institution. The alternative, as aptly expressed by President Truman in his address which opened the National Labor-Management Conference of 1945, still holds. He then said: "The American people know the enormous size of your task. But the stakes are enormous, too. If the people do not find the answers here, they will find them some place else. . . ."

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